No. 02-473 Status: ARGUED
Title: United States, Petitioner
v.
Lashawn L. Banks
Docketed: September 23, 2002
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (00-10439)
Decision Date: March 5, 2002
Rehearing Denied: May 24, 2002

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Aug 12 2002	Application (02A116) to extend the time to file a petition for a writ of certiorari from August 22, 2002 to September 21, 2002, submitted to Justice O'Connor.
Aug 14 2002	Application (02A116) granted by Justice O'Connor extending the time to file until September 21, 2002.
Sep 23 2002	Petition for writ of certiorari filed. (Response due October 23, 2002)
Nov 22 2002	Response Requested . (Due December 23, 2002)
Dec 19 2002	Order extending time to file response to petition until January 23, 2003.
Jan 23 2003	Motion for leave to proceed in forma pauperis filed by respondent Banks.
Jan 23 2003	Response to petition from respondent Banks filed.
Feb 5 2003	Reply of petitioner United States filed.
Feb 24 2003	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Feb 24 2003	Petition GRANTED.
Mar 10 2003	Motion to appoint counsel filed by respondent Banks.
Mar 19 2003	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including May 12, 2003.
Mar 25 2003	Brief amicus curiae of Wayne County, Michigan filed.
Mar 31 2003	Motion to appoint counsel filed by respondent granted and it is ordered that Randall J. Roske, Esquire, of Las Vegas, Nevada, is appointed to serve as counsel for the respondent in this case.
Apr 23 2003	Brief amicus curiae of Americans for Effective Law Enforcement, et al. filed.
May 12 2003	Joint Appendix filed.
May 12 2003	Brief of petitioner United States filed.
Jun 12 2003	Extension of time within which to file respondent's brief on the merits to and including July 12, 2003.
Jul 7 2003	SET FOR ARGUMENT October 15, 2003.
Jul 10 2003	Motion of the Solicitor General to allow David B. Salmons to argue pro hac vice filed.
Jul 11 2003	CIRCULATED.
Jul 11 2003	Brief of respondent Lashawn L. Banks filed. (Distributed)
Jul 29 2003	Record received from the U.S.C.A. for the 9th Circuit. (1 envelope)
Jul 31 2003	Record received from the U.S.D.C. for the Dist. of Nevada (5 volumes)
Aug 4 2003	Motion to argue pro hac vice filed by petitioner GRANTED.
Aug 15 2003	Reply of petitioner United States filed. (Distributed)
Oct 15 2003	Argued. For Petitioner: David B. Salmons, Assistant to the Solicitor General. For

Respondent: Randall J. Roske.

Supreme Court, U.S.
FILED
02 473 SEP 23 2002
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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

LASHAWN LOWELL BANKS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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51 pp

QUESTION PRESENTED

Whether law enforcement officers executing a warrant to search for illegal drugs violated the Fourth Amendment and 18 U.S.C. 3109, thereby requiring suppression of evidence, when they forcibly entered a small apartment in the middle of the afternoon 15-20 seconds after knocking and announcing their presence.

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In the Supreme Court of the United States

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UNITED STATES OF AMERICA, PETITIONER

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LASHAWN LOWELL BANKS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-19a) is reported at 282 F.3d 699. The district court's order denying respondent's motion to suppress (App., *infra*, 20a-21a) and the recommendation and report of the magistrate judge recommending against suppression (*id.* at 22a-32a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 5, 2002. A petition for rehearing was denied on May 24, 2002 (App., *infra*, 33a-34a). On August 14,

2002, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including September 21, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 3109 of Title 18 of the United States Code provides:

> **Breaking doors or windows for entry or exit**
>
> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

STATEMENT

Respondent was charged with possession of a controlled substance with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and with possession of a firearm as an unlawful drug user, in violation of 18 U.S.C. 922(g)(3). After the district court denied his

motion to suppress evidence, he pleaded guilty to both counts, reserving the right to appeal the denial of his suppression motion. The court of appeals reversed and remanded the case to the district court, holding that law enforcement officers violated the Fourth Amendment and 18 U.S.C. 3109 by waiting only 15-20 seconds, after knocking and announcing their presence, before forcibly entering respondent's apartment. App., *infra*, 1a-3a, 22a.

1. On Wednesday, July 15, 1998, at approximately 2 p.m., officers from the Las Vegas Police Department and the FBI executed a search warrant for cocaine and drug paraphernalia at respondent's apartment in North Las Vegas, Nevada. App., *infra*, 2a, 25a-26a. The search warrant was based on information, corroborated by a controlled buy, that respondent was selling cocaine at his apartment. The officers knew the apartment to be a small, two-bedroom unit. *Id.* at 14a. They first positioned themselves at the front and rear of the apartment and then loudly knocked on the front door and announced "police search warrant." *Id.* at 2a; see 18 U.S.C. 3109. The knock and announcement were loud enough to be heard by the officers positioned at the rear of the apartment. App., *infra*, 14a. The officers waited 15-20 seconds and, hearing no response, forcibly entered the apartment using a battering ram on the front door. Respondent claimed that he did not hear the officers knock and announce because he was in the shower, but he did hear the forcible entry. The officers discovered him standing outside the bathroom, having just emerged from the shower. *Id.* at 26a.

The search of the apartment turned up a .40 caliber semi-automatic pistol, a .380 caliber semi-automatic pistol with a laser sight and seven rounds in the magazine, a .22 caliber Beretta pistol, a bullet-proof vest,

rock and crack cocaine, and a scale. Respondent was charged with possession of a controlled substance with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and possession of a firearm as an unlawful drug user, in violation of 18 U.S.C. 922(g)(3). Indictment 2. He moved to suppress evidence, arguing, *inter alia*, that the officers violated the Fourth Amendment and 18 U.S.C. 3109 by failing to follow appropriate knock-and-announce procedures. See App., *infra*, 23a.[1] After the district court denied the motion, respondent pleaded guilty to both counts, reserving his right to appeal the denial of his suppression motion. *Id.* at 1a.

2. a. A divided panel of the court of appeals reversed the district court's denial of respondent's motion to suppress.[2] The majority held that the officers, having knocked and announced and received no response, failed to wait a reasonable amount of time before forcibly entering the apartment, thereby rendering the search unconstitutional and in violation of 18 U.S.C. 3109. App., *infra*, 4a, 7a-8a.

The majority set forth four categories of knock-and-announce cases, each requiring a different lapse of time before an officer may enter a residence after knocking and announcing and receiving no response:

> (1) entries in which exigent circumstances exist and non-forcible entry is possible, permitting entry to be made simultaneously with or shortly after

[1] In support of his motion to suppress, respondent also raised claims under the Fifth and Sixth Amendments. Those claims were rejected by the courts below, see App., *infra*, 8a-11a, and are not at issue in this petition.

[2] The majority opinion was written by Judge Henry A. Politz, then a senior Fifth Circuit judge sitting by designation, and was joined by Judge William A. Fletcher.

> announcement; (2) entries in which exigent circumstances exist and forced entry by destruction of property is required, necessitating more specific inferences of exigency; (3) entries in which no exigent circumstances exist and non-forcible entry is possible, requiring an explicit refusal of admittance or a lapse of a significant amount of time; and (4) entries in which no exigent circumstances exist and forced entry by destruction of property is required, mandating an explicit refusal of admittance or a lapse of an even more substantial amount of time.

App., *infra*, 5a-6a. Thus, under the majority's scheme, whether officers have waited a sufficient period of time before entering turns on two factors: (1) whether the entry was forcible and thus involved the destruction of property, and (2) whether exigent circumstances existed. *Ibid.* The majority concluded that no exigency was present in this case, thus placing the entry in the fourth category (forcible entry with no exigency), which requires the maximum period of delay. *Id.* at 6a.

The majority next articulated a non-exhaustive list of factors to be considered in assessing the reasonableness of an officer's waiting period once the proper entry category has been determined. Those factors include:

> (a) size of the residence; (b) location of the residence; (c) location of the officers in relation to the main living or sleeping areas of the residence; (d) time of day; (e) nature of the suspected offense; (f) evidence demonstrating the suspect's guilt; (g) suspect's prior convictions and, if any, the type of offense for which he was convicted; and (h) any other observations triggering the senses of the

officers that reasonably would lead one to believe that immediate entry was necessary.

App., *infra*, 6a-7a. The majority noted that sound traveled easily through respondent's small apartment, and that the officers heard no sound coming from the unit that suggested that an occupant was moving away from the door or doing anything else that would indicate a refusal of entry. As noted above, the majority concluded that no exigency existed. For those reasons, the majority held that a 15-20 second delay after knocking and announcing was not "sufficient in duration to satisfy the constitutional safeguards." *Id.* at 8a. The majority did not indicate how much additional delay before entering was necessary to satisfy the Fourth Amendment.

b. Judge Fisher dissented, concluding that the majority had neglected its own list of factors. In particular, he emphasized that the apartment was small, the search was executed in the middle of the afternoon, the officers had strong evidence of drug dealing (including a controlled buy establishing that respondent was selling drugs out of his apartment), and the officers could reasonably have been concerned about the destruction of evidence. App., *infra*, 14a. Under those circumstances, Judge Fisher concluded, a 15-20 second delay was sufficient. *Id.* at 15a. He further stressed that the majority's opinion provided no meaningful guidance to law enforcement officers. And he pointed out that because respondent was in the shower and did not hear the officers knock and announce, additional delay before entry would have made no difference in how the events unfolded. *Id.* at 16a. Finally, Judge Fisher emphasized that the majority opinion conflicted with the decisions of several other courts of appeals,

which have held that a 15-20 second (or shorter) delay before entering was reasonable under similar circumstances. *Id.* at 16a-18a.

REASONS FOR GRANTING THE PETITION

The court of appeals' decision creates a complex, four-part matrix for determining how long officers must wait, after knocking and announcing their presence and hearing no response, before they may enter a residence to execute a valid search warrant. That rigid, categorical approach is inconsistent with this Court's long-standing recognition that the Fourth Amendment does not "mandate a rigid rule of announcement," *Wilson* v. *Arkansas*, 514 U.S. 927, 934 (1995), and that the "general touchstone of reasonableness * * * governs the method of execution of the warrant." *United States* v. *Ramirez*, 523 U.S. 65, 71 (1998). In addition, by making the amount of time that officers must wait vary according to whether execution of a warrant requires property damage, the court of appeals' approach disregards this Court's holding in *Ramirez* that the reasonableness of a no-knock entry does not depend on whether property must be damaged. *Ibid.*

The Ninth Circuit's decision in this case conflicts with the holdings of numerous other courts of appeals that have upheld forcible entries in similar factual circumstances. Even where officers have had less specific reasons for making a forced entry than those in this case, courts have routinely upheld forcible entries involving significantly shorter delays than the 15-20 seconds at issue here.

The court of appeals' decision also creates significant uncertainty—and needless and potentially dangerous delays—in a recurring aspect of police practice. By supplanting the general reasonableness standard gov-

erning the execution of warrants with an amorphous and unworkable categorical scheme, the court has left law enforcement officers in the Ninth Circuit with no meaningful guidance on how much delay after knocking and announcing is required by the Fourth Amendment. The court of appeals' holding is particularly problematic in this regard because the facts of this case clearly justified a prompt entry and because, as the dissent below emphasized, the events would not have unfolded any differently had the officers waited longer before entering. For those reasons, the court of appeals' decision threatens to frustrate the safe and effective performance of front-line law enforcement duties. This Court's review is therefore warranted.

A. The Court Of Appeals' Decision Is Inconsistent With This Court's Precedent

1. The complex and confusing categorical scheme adopted by the court of appeals is inconsistent with the general reasonableness standard mandated by this Court's cases. The court's rigid, four-part matrix cannot be reconciled with this Court's insistence that the "general touchstone of reasonableness which governs Fourth Amendment analysis * * * governs the method of execution of the warrant." *Ramirez*, 523 U.S. at 71; see *Wilson*, 514 U.S. at 934 (stating Fourth Amendment does not "mandate a rigid rule of announcement that ignores countervailing law enforcement interests"); *Richards* v. *Wisconsin*, 520 U.S. 385, 387 (1997) (same). As was the case in *United States* v. *Arvizu*, 122 S. Ct. 744, 750-751 (2002), where this Court reversed a similarly flawed Fourth Amendment standard created by the Ninth Circuit, the approach taken by the court of appeals in this case imposes an

artificial set of categories on the Fourth Amendment's general requirement of reasonableness.

Under an analysis for reasonableness, officers may almost always conclude that they have effectively been refused admittance, thus justifying a forcible entry, when 15-20 seconds have elapsed after knocking and announcing their presence. Indeed, a shorter period of delay is generally reasonable when officers are executing a warrant to search for drugs, where the object of the search is subject to easy destruction and where violent armed responses are common. Officers need not let a prolonged delay frustrate the purpose of the search or expose them to undue danger.

The court of appeals' categorical approach disregards the realities confronting officers executing warrants. A prime example is the court's rule that, while non-exigent entries that can be accomplished without force require "a lapse of a significant amount of time," all "entries in which no exigent circumstances exist and forced entry by destruction of property is required, mandat[e] an *explicit refusal* of admittance or *a lapse of an even more substantial amount of time*." App., *infra*, 5a-6a (emphasis added). Taking that rule at face value, it appears that the court of appeals would require officers faced with a visibly barricaded door but no exigent circumstances either to receive express refusal of admittance or to delay "an even more substantial amount of time" before attempting to enter the premises. But in such circumstances, the barricaded door, which will have to be damaged to permit entry, itself may support the officers' conclusion that their admittance had been *constructively* denied or that prompt entry was reasonable.

Likewise, absent exigent circumstances, that same rule would appear to require officers executing a search

warrant at a residence they knew to be locked and empty to go through the ritual of knocking and announcing at the empty building and then waiting "an even more substantial amount of time" before forcibly entering. Such a result is contrary to the settled proposition that the knock-and-announce requirement does not compel officers to engage in "senseless ceremon[ies]," *Wilson*, 514 U.S. at 936, including knocking and announcing where doing so would be "futile." *Richards*, 520 U.S. at 394.

2. The categorical test articulated by the court of appeals is flawed in another critical respect. The test makes the need to destroy property a pivotal factor in deciding how long officers must wait, after knocking and announcing, before entering a residence to execute a search warrant. Indeed, under the court of appeals' approach, the need to destroy property becomes the first and primary inquiry. The court stated that, as an initial matter, "we categorize entries as either forced or non-forced" based upon the need to damage property to effectuate the entry. App., *infra*, 6a. After that inquiry, "[t]he reasonableness must *then* be determined in light of the totality of the circumstances surrounding the execution of the warrant." *Ibid.* (emphasis added). But this Court's decision in *Ramirez* demonstrates that the focus on the destruction of property in determining the timing of an entry is misplaced.

In *Ramirez*, the Ninth Circuit had held that when an officer executes a warrant by entering a residence without knocking and announcing, "more specific inferences of exigency are necessary" to justify the entry if property will be destroyed than if property will not be destroyed. 523 U.S. at 70 (quoting *United States* v. *Ramirez*, 91 F.3d 1297, 1301 (1996)). This Court rejected that proposition, stating that "a no-knock entry

is justified if police have a 'reasonable suspicion' that knocking and announcing would be dangerous, futile, or destructive to the purposes of the investigation. Whether such a 'reasonable suspicion' exists depends in no way on whether police must destroy property in order to enter." *Id.* at 71.

Although *Ramirez* involved a no-knock entry, its reasoning is equally applicable here. *Ramirez* reflects a general principle that the need to damage property in order to effectuate an entry to execute a search warrant should not be part of the analysis of determining whether the entry itself was reasonable.[3] Rather, the dispositive issues in evaluating the timing of an entry are whether admittance has been effectively refused and whether other law enforcement needs render prompt entry reasonable. Cf. *United States* v. *Knapp*, 1 F.3d 1026, 1030 (10th Cir. 1993) (observing that where no exigent circumstances permitted officers to disregard knock-and-announce requirement, "the critical issue is whether the officers were constructively refused admittance under § 3109 by waiting ten to twelve seconds without receiving a response."). Thus, the proper analysis focuses on how long a reasonable officer would wait before concluding that continued delay would be futile, risk frustrating the purposes of the warrant, or expose persons to serious danger. Cf. *Richards*, 520 U.S. at 394. Property destruction is a

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[3] That is not to suggest that "[e]xcessive or unnecessary destruction of property" does not trigger Fourth Amendment concerns. *Ramirez*, 523 U.S. at 71. But here, there does not appear to have been any more damage to respondent's property than was required to enter his apartment. And, in any event, excessive damage to property would not support the suppression of evidence. *Ibid.*

necessary consequence of the resident's failure to open the door; it is not a factor that requires additional delay.

Because, as *Ramirez* holds, the lawfulness of the entry does not depend on whether property must be destroyed even where officers executing a warrant must make a special showing of "reasonable suspicion" to justify a no-knock entry, it follows that the prospect of property destruction does not require additional delay in the circumstances presented here. The court of appeals, however, without even mentioning *Ramirez*, engrafted a rigid property-destruction principle onto the knock-and-announce requirement of the Fourth Amendment and 18 U.S.C. 3109. That aspect of the court's holding alone justifies this Court's review.

B. The Decision Below Conflicts With Decisions Of Other Courts Of Appeals

The court of appeals' holding also directly conflicts with the decisions of numerous other circuit courts, which have upheld forcible entries involving comparable (or shorter) delays in similar (or less compelling) factual circumstances. Here, the officers were executing a valid warrant for drugs during the middle of the afternoon at an apartment that they knew to be quite small and that they had probable cause to believe contained readily disposable drugs. They also knew that respondent was selling cocaine at his apartment. App., *infra*, 14a. The court of appeals' holding that the delay under these circumstances was too short and therefore violated the Fourth Amendment and 18 U.S.C. 3109 is unprecedented. As the discussion below demonstrates, there is little doubt that the instant entry would have been upheld in many other circuits.

In *United States* v. *Lucht*, 18 F.3d 541, 548-549 (8th Cir.), cert. denied, 513 U.S. 949 (1994), for example, the

court of appeals upheld the district court's finding that law enforcement officers acted reasonably when they attempted to execute a warrant to search for methamphetamine at 7 a.m. by knocking and announcing and waiting approximately 20 seconds before forcibly entering the premises. The court explained:

> [T]he [district] court found that [the defendants'] houses were small, the occupants were awake, there was probable cause to believe [the defendants] possessed narcotics, and the officers waited twenty seconds for a response after knocking and announcing their presence and purpose. In these circumstances, the possibility was slight that those within did not hear or could not have responded promptly, if in fact they had desired to do so.

Id. at 549. Thus, the Eighth Circuit found no knock-and-announce violation when officers waited for essentially the same period as at issue here, but where the residence was larger and the forcible entry took place early in the morning, when residents are more likely to be asleep or in the shower, rather than in the middle of a weekday afternoon, as in this case.

Similarly, in *United States* v. *Spriggs*, 996 F.2d 320, cert. denied, 510 U.S. 938 (1993), the D.C. Circuit upheld the district court's denial of the defendant's motion to suppress heroin, cash, and drug paraphernalia seized from his apartment during a search that was conducted between 7:30 and 7:45 on a weekday morning. Law enforcement officers forced open the front door of the apartment after waiting approximately 15 seconds. In those circumstances, the court held that "the agents were justified in concluding that they had been constructively refused admittance when the occupants failed to respond within 15 seconds of their announce-

ment." *Id.* at 323; see *United States* v. *Jones*, 133 F.3d 358, 361-362 (5th Cir.) (noting that courts have generally found no violation "when officers have waited more than 5 seconds," and holding that "[i]n drug cases, where drug traffickers may so easily and quickly destroy the evidence of their illegal enterprise by simply flushing it down the drain, 15 to 20 seconds is certainly long enough for officers to wait before assuming the worst and making a forced entry."), cert. denied, 523 U.S. 1144 (1998).

Numerous other decisions have upheld delays of 15-20 seconds (or less) in generally similar factual circumstances. See, *e.g.*, *United States* v. *Garcia*, 983 F.2d 1160, 1168 (1st Cir. 1993) (holding that "a wait of ten seconds after knocking combined with an announcement before forced entry, was reasonable" because "[t]he occupants of the apartment were reasonably believed to possess cocaine, a substance that is easily and quickly hidden or destroyed"); *United States* v. *Gatewood*, 60 F.3d 248, 250 (6th Cir.) (concluding that delay of approximately ten seconds was sufficient before entering apartment officers knew to contain cocaine), cert. denied, 516 U.S. 1001 (1995); *United States* v. *Markling*, 7 F.3d 1309, 1318 (7th Cir. 1993) (holding that delay of seven seconds was sufficient before forcing entry where "[t]here was no noise coming from the apartment * * * that would have made it difficult for [defendant] to hear" the officers' announcement, the "motel room was small," and informants indicated that defendant "was likely to flush the cocaine * * * down the toilet."); *United States* v. *Goodson*, 165 F.3d 610, 612, 614 (8th Cir.) (holding that delay of 14-20 seconds before forcing entry did not violate Fourth Amendment where officers searched one-story ranch house for crack cocaine at 1:44 a.m.), cert. denied, 527

U.S. 1030 (1999); *United States* v. *Jenkins*, 175 F.3d 1208, 1215 (10th Cir.) (upholding delay of 14-20 seconds before forcing entry where search of defendant's residence took place at 10 a.m.), cert. denied, 528 U.S. 913 (1999). While complete uniformity cannot be expected on such a fact-sensitive question as the reasonableness of a delay before forcing entry, the Ninth Circuit's approach is significantly out of step with that of other circuits. This Court's review is warranted to resolve the conflict created by this decision.

C. The Court Of Appeals' Suppression Of Evidence Imposes Unjustified Costs On Society

The court of appeals' decision is problematic in an additional respect. As the dissent below emphasized (App., *infra*, 14a), it is clear under the facts of this case that the events would not have unfolded any differently had the officers waited longer before entering. It is undisputed that respondent was in the process of showering when the officers knocked at his door and that he claims that, for this reason, he did not hear the officers knock and announce. Accordingly, even if the officers had waited longer or knocked again before entering, respondent still would not have heard them and so still would not have admitted them to execute the warrant. And because the officers would thus have forcibly entered respondent's apartment and obtained the same evidence under the warrant-authorized search regardless of the violation found by the court of appeals, that supposed violation did not in any way harm respondent's property or privacy interests.

Nevertheless, the court of appeals accepted respondent's contention that "all evidence, including [respondent's] statements, constitute fruits of an illegal search and should be suppressed." App., *infra*, 4a. But the

suppression of "all evidence" on the basis of a supposed knock-and-announce violation that does no concrete harm to a defendant's constitutionally protected interests constitutes a disproportionate sanction against the government. See *United States* v. *Espinoza*, 256 F.3d 718, 725 (7th Cir. 2001) ("[T]he principle of proportionality demands that the application of the exclusionary rule should be limited only to those instances where the constitutional violation has caused actual harm to the interest * * * that the rights protect."), cert. denied, 122 S. Ct. 905 (2002); *id.* at 726 ("The exclusion of probative evidence is too disproportionately severe a remedy where the Fourth Amendment violation has not harmed the particular interest protected by the constitutional requirement at issue."); see also *United States* v. *Stefonek*, 179 F.3d 1030, 1035 (7th Cir. 1999) ("[T]here must be a causal relation between the violation of the Fourth Amendment and the invasion of the defendant's interests for him to be entitled to the remedy of exclusion."); *ibid.* ("[T]he violation of the Fourth Amendment in this case did no harm to any of the interests that the amendment protects, so that exclusion of the evidence seized under the warrant would be a disproportionate sanction."), cert. denied, 528 U.S. 1162 (2000). As this Court explained in *Nix* v. *Williams*, 467 U.S. 431, 443 (1984), "the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse*, position that they would have been in if no police error or misconduct had occurred." See *Segura* v. *United States*, 468 U.S. 796, 814 (1984) (rejecting suppression based on allegedly illegal entry because "[h]ad police never entered the apartment, but instead conducted a perimeter stakeout

to prevent anyone from entering the apartment and destroying evidence, the contraband now challenged would have been discovered and seized precisely as it was here"). Where, as in this case, there is no harm to a defendant's interests protected by the knock-and-announce requirement, society's vital interests in combating crime—in particular the scourge of drug trafficking and related violence—should not be sacrificed by application of the exclusionary rule.

D. The Court of Appeals' Decision Creates Significant Uncertainty In A Recurring Aspect Of Police Activity

In addition to the conflicts it creates with the decisions of this Court and other courts of appeals, the Ninth Circuit's categorical test warrants review because it is incapable of predictable application by either officers in the field or courts—especially in view of the result reached in this case. Absent exigent circumstances, the court of appeals would require "a lapse of a significant amount of time" before making a *non-forcible* entry. App., *infra*, 5a. Where no exigency is present and a *forced* entry is necessary, the court of appeals would require "an even more substantial amount of time" before forcing entry. *Id.* at 6a. Those generalities are insufficient to provide meaningful guidance to officers engaged in the dangerous business of executing search warrants.

This case illustrates the point. Here, the officers waited 15-20 seconds after knocking and announcing to execute a warrant to search for drug evidence, evidence that is easy to dispose of or destroy. Although the court made clear that a 15-20 second delay is, in its view, plainly insufficient, it did not give any indication of how much more delay was necessary, or how the officers were supposed to know the amount of delay

that would be acceptable under the court's approach. Further, the court of appeals did not adequately explain why 15-20 seconds with no response does not support a reasonable concern that respondent might be quietly seeking to destroy the evidence by, for example, flushing the drugs down the toilet.

If 15-20 seconds is not enough delay here—where the warrant was for easily disposable drugs, the officers had strong evidence that drugs are routinely sold from respondent's premises, the search occurred in the daytime, and the apartment was so small that the bathroom was only a few steps away from any part of the premises—then it would seem to be a very rare case in which such a delay could ever be sufficient. The court of appeals' approach thus threatens to complicate and confuse the process of executing search warrants, and to subject law enforcement personnel to unnecessary, and unacceptable, risks in the process.

Fourth Amendment rules that are unduly complicated cannot give officers the guidance needed to make difficult on-the-spot judgments in the heat of the moment. Other courts have recognized that delays of 15-20 seconds after knocking and announcing are sufficient to make a forced entry reasonable; in the Ninth Circuit, officers must now pause to make assessments of how much property must be destroyed to effect an entry, and how specific are the exigencies that prompt the entry. Even then, the officers have no guidance about how much longer they must wait in a case like this. Because that approach departs from this Court's cases and frustrates effective law enforcement, the conflict created by the decision below should be resolved by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2002

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-10439

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

LASHAWN LOWELL BANKS, DEFENDANT-APPELLANT

Argued and Submitted Sept. 10, 2001
Filed March 5, 2002

Before: POLITZ,* W. FLETCHER, and FISHER, Circuit Judges.

Opinion by Judge POLITZ; Partial Concurrence and Partial Dissent by Judge FISHER.

POLITZ, Circuit Judge.

Lashawn Lowell Banks appeals his guilty plea conviction for possession of a controlled substance with intent to distribute, and for being a drug user in possession of a firearm. His plea followed the district court's denial of his motion to suppress certain evidence. Banks reserved his right to appeal. A close review of

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* Honorable Henry A. Politz, Senior United States Circuit Judge for the Fifth Circuit Court of Appeals, sitting by designation.

the record, counsel's arguments, and guiding principles, persuades us that a reversal and remand is in order.

BACKGROUND

The present action concerns the execution of a search warrant on Banks' apartment by North Las Vegas Police Department officers and FBI agents. The officers positioned themselves at the front and rear of the apartment and followed the statutory "knock and announce" procedure by knocking loudly on the apartment door and announcing "police search warrant." *See* 18 U.S.C. § 3109. After fifteen to twenty seconds without a response, armed SWAT officers made a forced entry into Banks' apartment.

Once inside, the officers found Banks in the hallway outside his bathroom. Banks, who obviously had just emerged from his shower, was forced to the floor and handcuffed. He then was seated at his kitchen table for questioning and shortly thereafter was provided underwear with which to cover himself. Two agents questioned Banks while other officers searched his apartment. Banks maintains that he was under the influence of drugs and alcohol during the interrogation. Both agents, however, testified that they perceived no indications that Banks was under the influence. Banks also asserts that he was nervous and intimidated by a "good-cop versus bad-cop" routine utilized by the interrogating agents and the hooded SWAT officers searching the apartment. The interrogating agents maintain that Banks appeared calm and was able to reason throughout the interview.

The agents questioned Banks for approximately forty-five minutes, and about midway thereof asked Banks to reveal his suppliers. Banks stated that he

would not reveal his suppliers before talking to an attorney. The agents continued the questioning.

Prior to trial Banks moved to suppress the statements he made during the interrogation. He contends that the statements should have been suppressed on the grounds that they were obtained: (a) in violation of 18 U.S.C. § 3109 because the officers failed to wait a reasonable period of time before forcefully entering his residence when executing the search warrant; (b) in violation of the fifth amendment because he did not make a knowing and voluntary waiver of his rights during the interrogation; and (c) in violation of the fifth amendment because the interrogation continued after he made an unequivocal request for an attorney. The district court denied the suppression motion. Following this denial, Banks pled guilty to possession of a controlled substance with intent to distribute and to being a drug user in possession of a firearm.

Banks expressly reserved his right to appeal the court's denial of his Motion to Suppress. This appeal followed.

ANALYSIS

I. 18 U.S.C. § 3109

We review a trial court's legal conclusions *de novo*, reviewing findings of fact underlying those conclusions for clear error.[1]

Title 18 U.S.C. § 3109, commonly referred to as the "knock and announce" statute, establishes guidelines

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[1] *United States v. Granville*, 222 F.3d 1214, 1217 (9th Cir. 2000) (noting that legal conclusion that "knock and announce" statute was violated is reviewed *de novo*, while findings regarding facts underlying the conclusion are reviewed for clear error).

for federal law enforcement officers when executing a search warrant. The statute directs that:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

18 U.S.C. § 3109.

Under the facts at bar this statute raises two critical issues: (a) whether the officers provided notice of their authority and purpose; and (b) whether they were refused admittance. There is no dispute that proper notice of authority and purpose was given herein. Before us is the second issue, refusal of admittance.

Banks contends that the officers executing the search warrant entered his apartment illegally because they failed to wait a reasonable time, after receiving no response, before forcefully entering his quarters. Banks further contends that because the entry was in violation of his fourth amendment rights and 18 U.S.C. § 3109, all evidence, including his statements, constitute fruits of an illegal search and should be suppressed. We find this contention persuasive.

A literal application of the statute would allow entry only after both announcement and specific denial of admittance. Our precedents, however, dictate that an affirmative refusal of entry is not required by the statute, and that refusal may be implied in some instances. *See, e.g., United States v. Allende*, 486 F.2d 1351, 1353 (9th Cir. 1973). "A failure to answer a knock and announcement has long been equated with a refusal

to admit the search party and a justification for forcible entry." *United States v. Ramos*, 923 F.2d 1346, 1356 (9th Cir. 1991) overruled on other grounds by *United States v. Ruiz*, 257 F.3d 1030 (9th Cir. 2001) (citations omitted). Furthermore, "[t]here are no set rules as to the time an officer must wait before using force to enter a house; the answer will depend on the circumstances of each case."[2]

Section 3109 serves the following interests: (a) reducing the risk of harm to both the officer and the occupants of the house to be entered; (b) helping to prevent the unnecessary destruction of private property; and (c) symbolizing respect for individual privacy summarized in the adage that "a man's house is his castle." *United States v. Bustamante-Gamez*, 488 F.2d 4, 9 (9th Cir. 1973) (quoting *Miller v. United States*, 357 U.S. 301, 307, 78 S. Ct. 1190, 2 L. Ed. 2d 1332 (1958)).

Entries may be classified into four basic categories, consistent with the interests served by 18 U.S.C. § 3109: (1) entries in which exigent circumstances exist and non-forcible entry is possible, permitting entry to be made simultaneously with or shortly after announcement; (2) entries in which exigent circumstances exist and forced entry by destruction of property is required, necessitating more specific inferences of exigency; (3) entries in which no exigent circumstances exist and non-forcible entry is possible, requiring an explicit refusal of admittance or a lapse of a significant amount of time; and (4) entries in which no exigent circumstances exist and forced entry by destruction of property is required, mandating an explicit refusal of admittance or

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[2] *McClure v. United States*, 332 F.2d 19, 22 (9th Cir. 1964), *cert. denied*, 380 U.S. 945, 85 S. Ct. 1027, 13 L. Ed. 2d 963 (1965).

a lapse of an even more substantial amount of time. *Id.* at 12. The action at bar falls into the final category because no exigent circumstances existed[3] and the entry required destruction of property—i.e., the door to Banks' apartment.

Consideration of the foregoing categories aids in the resolution of the essential question whether the entry made herein was reasonable under the circumstances. In addressing that inquiry, we categorize entries as either forced or non-forced. The reasonableness must then be determined in light of the totality of the circumstances surrounding the execution of the warrant, particularly considering the duration of the officers' pause before making a forced entry after the required knock and announcement.

Our task is to determine what constitutes a reasonable waiting period before officers may infer that they have been denied admittance. In assessing the reasonableness of the duration of the officers' wait, we review all factors that an officer reasonably should consider in making the decision to enter without an affirmative denial. Those factors include, but are not limited to: (a) size of the residence; (b) location of the residence; (c) location of the officers in relation to the main living or sleeping areas of the residence; (d) time of day; (e) nature of the suspected offense; (f) evidence demonstrating the suspect's guilt; (g) suspect's prior

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[3] This court reviews the mixed question of law and fact as to whether exigent circumstances exist *de novo*. *United States v. McConney*, 728 F.2d 1195, 1204-05 (9th Cir. 1984) (en banc). Exigent circumstances exist when "there [is] a likelihood that the occupants [will] attempt to escape, resist, destroy evidence, or harm someone within. . . ." *Id.* at 1205. No such evidence was presented in this case.

convictions and, if any, the type of offense for which he was convicted; and (h) any other observations triggering the senses of the officers that reasonably would lead one to believe that immediate entry was necessary.

In the case before us, the officers knocked once and announced their purpose. The officers heard no sound coming from the small apartment that suggested that an occupant was moving away from the door, or doing anything else that would suggest a refusal of admittance. We know from the record that sounds were transmitted relatively easily, for Officer Tomasso, waiting outside at the rear of the apartment, heard Officer Crespo's knock at the front door. Yet none of the officers testified that they heard any sound coming from within the apartment. There was nothing else that triggered the officers' senses, and there were no exigent circumstances warranting a waiver of the reasonable delay. The officers had no specific knowledge of any facts or reasonable expectations from which they could reasonably have believed that entry into Banks' residence would pose any risk greater than the ordinary danger of executing a search warrant on a private residence.

Because the officers were not affirmatively granted or denied permission, they were required to delay acting for a sufficient period of time before they could reasonably conclude that they impliedly had been denied admittance. After pausing a maximum of fifteen to twenty seconds, the officers forced entry. Banks came out of his shower upon hearing the sound of his door being forced open, and stumbled into the hallway concerned that his apartment was being invaded. Upon entering, the officers found Banks naked, wet, and soapy from his shower. Under these circumstances, we

are not prepared to conclude that the delay of fifteen to twenty seconds after a single knock and announcement before forced entry was, without an affirmative denial of admission or other exigent circumstances, sufficient in duration to satisfy the constitutional safeguards.

II. Banks' Fifth and Sixth Amendment Claims

As noted above, we review a trial court's legal conclusions *de novo*, and our review of findings of fact underlying those conclusions is for clear error. However, "[w]e review the district court's determination that the defendant knowingly and voluntarily waived his *Miranda* rights under the clearly erroneous standard." *United States v. Fouche*, 833 F.2d 1284, 1286 (9th Cir. 1987).

1. *The Voluntariness of Banks' Statements*

The fifth amendment states that no person "shall be compelled in any criminal case to be a witness against himself."[4] Under the teachings of *Miranda v. Arizona*,[5] to assure the meaningful protection of this fifth amendment right, a defendant subject to custodial interrogation must be advised of his "right to remain silent, that any statement he does make may be used . . . against him, and that he has a right to the presence of an attorney, either retained or appointed." *Id.* at 444, 86 S. Ct. 1602. A knowing and voluntary waiver of these rights is permissible. Such a waiver, however, must be established by a preponderance of the evidence. *Colorado v. Connelly*, 479 U.S. 157, 168-69, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986).

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[4] U.S. Const., amend. V.

[5] 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Banks contends that his statements were obtained involuntarily and through coercion in violation of his fifth amendment rights. He complains that because he was under the influence of alcohol and narcotics at the time of the interrogation, he was unable to make a knowing and voluntary waiver of his rights. He further asserts that his statements were coerced because he was terrorized by the entry of the police into his home, intimidated by officers employing the "good-cop versus bad-cop" routine, and in fear of being paraded naked around the neighborhood. Our review of the record, however, persuades us that the district court did not err in its determination that he made a knowing and voluntary waiver of these rights.

A confession made in a drug or alcohol induced state, or one that is the product of physical or psychological pressure, may be deemed voluntary if it remains "the product of a rational intellect and a free will. . . ." *Medeiros v. Shimoda*, 889 F.2d 819, 823 (9th Cir. 1989) (citations omitted). The interrogating agents testified about Banks' demeanor during the interrogation. Neither detected any indication that Banks was under the claimed adverse influence, and both described him as calm and able to reason. Similarly, the record demonstrates that Banks was able to understand the circumstances, follow instructions, and answer questions. From the record, Banks does not appear to have been "incapacitated" by his use of drugs and alcohol. During the interrogation, he answered some of the agent's questions while refusing to answer those regarding his suppliers and was able to provide officers with the combination to his safe. Prior to being taken to the police station, he requested that his girlfriend be contacted so she could secure his apartment. Because

the evidence supports the district court's conclusion that Banks' statements were the product of rational intellect and a free will, we hold that the district court did not err in finding a knowing and voluntary waiver.

2. *Banks' Right to Counsel Under* Miranda

Banks also contends that his statements were obtained in violation of his right to counsel under *Miranda*. No further questioning of a suspect may occur after he expresses the desire to consult with counsel, and police must clarify an ambiguous or equivocal request for an attorney. *Miranda*, 384 U.S. at 474, 86 S. Ct. 1602; *see also United States v. Fouche*, 833 F.2d 1284, 1287 (9th Cir. 1985), *cert. denied*, 486 U.S. 1017, 108 S. Ct. 1756, 100 L. Ed. 2d 218 (1988). Notwithstanding, "a defendant may selectively waive his *Miranda* rights, deciding to respond to some questions but not others." *Bruni v. Lewis*, 847 F.2d 561, 563 (9th Cir. 1988) (citations omitted).

In support of his claim that his right to counsel under *Miranda* was violated, Banks asserts that during the latter part of his questioning he told the agents that he wanted to consult with a lawyer about the possibility of making a "deal" in exchange for divulging information about his suppliers. The record reflects that when the agents asked Banks a question regarding his suppliers, he responded that he wanted to speak to an attorney before revealing his suppliers to see if he could secure some consideration, what one might deem a *quid pro quo*, for his cooperation with the officers. The agents reasonably understood Banks' statement to mean he

was willing to answer some questions but not others. That conclusion is fully supported by the record.[6]

The judgment is AFFIRMED in part, REVERSED in part and the matter is REMANDED for further proceedings consistent herewith.

FISHER, Circuit Judge, dissenting in part, concurring in part.

The majority rules the entry in this case unconstitutional and in violation of § 3109 because the officers delayed only 15 to 20 seconds after knocking loudly on Banks' apartment door and announcing "police search warrant." Simply put, the police should have waited longer—how much longer is not specified—before they could lawfully assume that their knock and announcement had been heard, that Banks was not going to open the door voluntarily and that they were justified in forcing the door open with a battering ram. Op. at 704. I share my colleagues' concerns that officers not peremptorily and forcibly invade the privacy of a suspect's home, and it is disquieting to visualize Banks' shock and embarrassment as he emerged naked and still soapy from his shower and confronted the officers who had just burst through his front door. *Cf. United States v. Becker*, 23 F.3d 1537, 1540 (9th Cir. 1994) ("The sanctity of a person's home, perhaps our last real retreat in this technological age, lies at the very core of the rights which animate the [fourth] amendment."). Nonetheless, although this case admittedly is a close call, I

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[6] *Fouche*, 833 F.2d at 1287 ("[I]f [a suspect] is indecisive in his request for counsel, there may be some question on whether he did or did not waive counsel . . . Situations of this kind must necessarily be left to the judgment of the interviewing Agent.") (quoting *Miranda*, 384 U.S. at 436, 86 S. Ct. 1602).

cannot agree that the officers here acted outside the limits of established case law or—more to the point—even the criteria the majority articulates. I therefore respectfully dissent from the § 3109 portion of the majority opinion (Part I). Otherwise, I concur in Part II of the opinion.

I do not think the outcome of this case can turn simply on the amount of time the officers waited after knocking. Banks did not hear the knock or announcement in the first place; thus it would have made no practical difference if the officers waited substantially longer than 15 or 20 seconds. If there was a problem of procedural or constitutional dimension, it had to be that the officers did not knock twice or engage in some other effort to determine whether Banks was home and had heard the first knock. Although hinting that was the real problem here, the majority nevertheless holds that the officers:

> were *required to delay acting* for a sufficient period of time before they could reasonably conclude that they impliedly had been denied admittance. . . .
>
> Under these circumstances, we are not prepared to conclude that the *delay* of fifteen to twenty seconds after a single knock and announcement before forced entry was, without an affirmative denial of admission or other exigent circumstances, *sufficient in duration* to satisfy the constitutional safeguards.

Op. at 704-05 (emphasis added).

In assessing whether there was a reasonable delay, the majority acknowledges that "[t]here are no set rules as to the time an officer must wait before using force to enter a house; the answer will depend on the

circumstances of each case." *McClure v. United States*, 332 F.2d 19, 22 (9th Cir. 1964); *see also United States v. Bustamante-Gamez*, 488 F.2d 4, 9 (9th Cir. 1973) ("In short, 'a claim under 18 U.S.C. § 3109 depends upon the particular circumstances surrounding the [entry].'") (quoting *Jones v. United States*, 362 U.S. 257, 272, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960)).

Nonetheless, the majority then extrapolates from *Bustamante-Gamez* four basic categories of entry, placing this case in category 4: "entries in which no exigent circumstances exist and forced entry by destruction of property is required, mandating an explicit refusal of admittance or a lapse of an even more substantial amount of time"—that is, substantially more than the "significant amount of time" required under category 3.[1] Refining its analysis further, the majority sets forth a nonexclusive list of factors "an officer reasonably should consider in making the decision to enter [forcibly] without an affirmative denial." *See* Op. at 704. The source of this list is not identified, but I have no quarrel with its substance—so long as it is not read as substituting a checklist approach to what our case law recognizes is a circumstance-specific evaluation.

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[1] I say "extrapolate" because *Bustamante-Gamez* did not explicitly identify four categories, only three—albeit not as "categories." *Bustamante-Gamez* stated: "an explicit refusal of admittance or lapse of a significant amount of time is necessary if the officers have no facts indicating exigency." 488 F.2d at 9. The majority subdivides this into separate categories, depending on whether "non-forcible entry is possible" (category 3—requiring "a lapse of a *significant* amount of time") or "forced entry by destruction of property is required" (category 4—requiring "a lapse of *an even more substantial* amount of time"). Op. at 704 (emphasis added).

Where I do disagree with the majority, however, is its application of these factors—or more to the point, its disregard or discounting of key factors present here. Among the listed factors are "(a) size of the residence"; "(c) location of the officers in relation to the main living or sleeping areas of the residence"; and "(e) nature of the suspected offense." Banks lived in a small, two-bedroom, one-bathroom apartment. The bathroom was located in the middle part of the apartment. Banks testified that, "It's not a very big apartment." And, "2 steps from the shower is—you can look left, see the door." Arriving at Banks' apartment at about 2:00 p.m., the officers positioned themselves at the front and back doors. There is no dispute that the officers gave proper notice of their authority and purpose. Officer Crespo knocked loudly on the front door and announced "police search warrant." Officer Tomasso, at the rear, testified he heard Crespo's loud knock. (The record is silent as to Tomasso's also having heard the announcement, or whether anyone heard water running or other sounds of someone taking a shower.) On these facts, the officers could reasonably have assumed Banks had heard at least the loud knock and probably the announcement.

Moreover, Banks' suspected offense was drug dealing; the warrant to search his apartment was predicated upon information, corroborated by a controlled buy, that Banks was selling cocaine at his apartment. Thus there was some basis for concern that Banks' delay in responding might be related to attempts to dispose of evidence. *See United States v. Spikes*, 158 F.3d 913, 926 (6th Cir. 1998), where the court noted that "where drug traffickers may easily and quickly destroy the evidence of their illegal enterprise by simply

flushing it down the drain, 15 to 20 seconds is certainly long enough for officers to wait before assuming the worst and making a forced entry." *Spikes* also cautioned that "[t]his reality, however, must be balanced against the fact that the simple presence of drugs alone does not justify abandoning the 'knock and announce' rule or so diluting its requirements that it becomes a meaningless gesture. . . . Thus the presence of drugs in the place to be searched, while not a conclusive factor, lessens the length of time law enforcement must ordinarily wait outside before entering a residence." *Id.* (citation omitted). *See also United States v. Jones*, 133 F.3d 358, 361-62 (5th Cir. 1998) (reviewing cases, and upholding wait of 15 to 20 seconds after knock "given the possibility that a longer wait might well have resulted in the destruction of evidence [illegal drugs]"); *United States v. Garcia*, 983 F.2d 1160, 1168 (1st Cir. 1993) (holding wait of 10 seconds after knock reasonable where occupants of apartment were believed to possess cocaine, "a substance that is easily and quickly hidden or destroyed"). *But cf. Becker*, 23 F.3d at 1541 ("[W]hile peril to officers or the possibility of destruction of evidence or escape may well demonstrate an exigency [justifying immediate entry], mere unspecific fears about those possibilities will not."); *United States v. Moreno*, 701 F.2d 815, 818 (9th Cir. 1983), *vacated on other grounds by* 469 U.S. 913, 105 S. Ct. 286, 83 L. Ed. 2d 223 (1984) ("In order to justify forced entry without an announcement of authority and refusal of admittance, there must be some evidence to support the suspicion that contraband will be destroyed."); *United States v. Fluker*, 543 F.2d 709, 717 (9th Cir. 1976) (no evidence the defendants were destroying narcotics to justify officers entering without any knock or announcement).

The majority acknowledges some of these factors in passing, but gives them little or no weight. With respect, I fail to see what guidance law enforcement should draw from such a holding that disregards some of the very factors the majority identifies as relevant. Nor do I think the majority's conclusion is warranted under these circumstances, or in light of decisions involving comparable situations where a 15 to 20 second delay has been held sufficient.

First, 15 to 20 seconds is not an insignificant amount of time to wait after a loud knock and announcement. Knock, then count out the time to see for yourself.

Second, Banks was in the shower and did not hear the knock and announcement, so even if the wait had been longer, absent another knock or announcement, he still would not have responded.

Third, although there is no Ninth Circuit precedent directly on point, our case law—albeit cautionary—and that of other circuits tends to support the entry here. We previously have held that a five second wait after three loud knocks and an announcement was not a reasonably significant amount of time to permit the defendant to determine who was at the door and to respond to the request for admittance, where the warrant was executed early in the morning and the occupants of the apartment were likely to be asleep. *United States v. Granville*, 222 F.3d 1214, 1218-19 (9th Cir. 2000). Here, however, the warrant was executed in the middle of the afternoon and there was ample time for Banks to respond to the request for admittance. The Sixth Circuit has held that "when officers execute a warrant in the middle of the day . . . the length of time the officers must tarry outside diminishes." *Spikes*, 158 F.3d at 927. Furthermore, given the small

size of Banks' apartment, there was no reason for the officers to assume Banks had not had sufficient time to hear and respond to the knock and announcement in the 15 to 20 second interval. The Eighth Circuit specifically addressed such a circumstance in *United States v. Lucht*, 18 F.3d 541 (8th Cir. 1994). There, the court concluded a 20 second wait after a knock and announcement was reasonable where the defendants' houses were small, the defendants were awake at the time and there was probable cause to believe they possessed narcotics. *Id.* at 549. "In these circumstances, the possibility was slight that those within did not hear or could not have responded promptly, if in fact they had desired to do so." *Id.* The Tenth Circuit has upheld an entry after a 10 to 12 second wait. *United States v. Knapp*, 1 F.3d 1026 (10th Cir. 1993). Because the defendant, whose presence was assumed given the illuminated lights in the house, gave no indication he intended to allow the officers into his home voluntarily, the court held, "[i]t was plausible for the officers to conclude that they were affirmatively refused entry after a ten to twelve second interval without a verbal or physical response." *Id.* at 1031.

In a case quite similar to this, the District of Columbia Circuit held that a 15 to 20 second wait after a single knock and announcement was sufficient, and that a second knock was not required. *United States v. Spriggs*, 996 F.2d 320 (D.C. Cir. 1993).

> Clearly the agents did not act unreasonably in entering the apartment after knocking and announcing themselves only a single time. . . . One need seek admittance only once in order to be refused. . . . With respect to the delay before entering, under our case law the agents were justified in concluding that

> they had been constructively refused admittance when the occupants failed to respond within 15 seconds of their announcement.

Id. at 322-23. On the other hand, in *United States v. Phelps*, 490 F.2d 644, 646 (9th Cir. 1974), in upholding a forced entry, we gave weight to the fact that agents had knocked and announced twice, waiting 5 to 10 seconds after each before forcing entry. But, noting the circumstance-specific nature of the inquiry, *Phelps* emphasized that "it matters not that the record reveals ten, fifteen, or twenty seconds, for the true rule rejects time alone, even 'an exceedingly short time,' such as ten seconds, as the decisive factor." *Id.* at 647 (citing *Jackson v. United States*, 354 F.2d 980 (1st Cir. 1965)); *see also United States v. Ramos*, 923 F.2d 1346, 1355-56 (9th Cir. 1991), *overruled on other grounds by United States v. Ruiz*, 257 F.3d 1030 (9th Cir. 2001) (en banc) (upholding entry after two knocks and announcements followed by 45 second delay). Thus, I do not read *Phelps* as *requiring* a second knock here, although—given the circumstances—that might have been a more effective way to assure that Banks heard the demand for entry and had an opportunity to respond.

I do not know what the majority makes of *Phelps* or *Spriggs*, because they are not discussed. Indeed, the majority neglects most of the authority I discuss above. Such authority at the very least provides guidance for determining the reasonableness of the 15 to 20 second wait considering the specific circumstances of Banks' situation—he resided in a small apartment, there was a loud knock and announcement, he was suspected of possessing illegal narcotics and the warrant was executed in the middle of the day. On these facts, I believe it was not unreasonable for the officers to conclude that Banks

had heard and constructively denied their request for entry. Accordingly, I respectfully dissent from Part I of the majority opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

CR-S-98-269-JBR (RLH)

UNITED STATES OF AMERICA, PLAINTIFF

v.

LASHAWN LOWELL BANKS, DEFENDANT

[Received: Apr. 20, 2000]

ORDER

This matter is before the Court on Defendant's Objections to the Report and Recommendation of United States Magistrate Judge (#55).

Background

Defendant is charged with Possession of a Controlled Substance with Intent to Distribute and Drug User in Possession of Firearm. These charges were brought as a result of a search of Defendant's residence where the drugs and firearm were found. Defendant brought a motion to suppress the evidence on the bases that 1) the police officers violated the "knock and announce" requirement pursuant to the Fourth Amendment and 18 U.S.C. § 3109; 2) Defendant's confession was involuntary; and 3) Defendant's *Miranda* waiver was not knowing and intelligent.

Following an evidentiary hearing, the magistrate judge found that Defendant's failure to answer the officer's knock and announcement justified the forced entry after fifteen to twenty seconds. The magistrate judge also found that despite Defendant's professed intoxication, his actions were consistent with an ability to make reasoned decisions. Finally, the magistrate judge found that Defendant had not unequivocally invoked his right to counsel.

The Court has conducted a *de novo* review of the record in this case in accordance with 28 U.S.C. § 636(b)(1)(B) and (C) and Local Rule IB 3-2 and determines that the Report and Recommendation of the magistrate judge should be adopted.

IT IS THEREFORE **ORDERED** that the magistrate judge's Report and Recommendation (#53) entered March 9, 2000, is ADOPTED.

IT IS FURTHER **ORDERED** that Defendant Lashawn Lowell Banks' Motion to Suppress (#48) is DENIED.

DATED this 18th day of April 2000.

/s/ JOHNNIE B. RAWLINSON
JOHNNIE B. RAWLINSON
United States District
Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

CR-S-98-269-JBR (RLH)

UNITED STATES OF AMERICA, PLAINTIFF

v.

LASHAWN LOWELL BANKS, DEFENDANT

REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE

(Motion to Suppress Evidence–#48)

Before the Court is LaShawn Lowell Banks' **Motion to Suppress (Evidentiary Hearing Requested)** (#48, filed December 23, 1999). The United States opposed the motion in the Government's Response to Defendant's Motion to Suppress (#50, filed January 6, 2000). An evidentiary hearing was conducted on March 6, 2000.

INTRODUCTION

Defendant LaShawn Lowell Banks in charged with one court of possession of a controlled substance with intent to distribute in violation of 21 U.S.C. § 841(a)(1) and one count of possession of a firearm as an unlawful drug user in violation of 18 U.S.C. § 922(g)(3). A search warrant was issued on July 14, 1998, authorizing law

enforcement officers to search the Defendant's property, and law enforcement officers of the Las Vegas Metropolitan Police Department entered the Defendant's home at 1404 Henry Drive, Apartment D, Las Vegas, Nevada, on July 15, 1998. Defendant brings this motion to suppress statement made by him in response to questioning by law enforcement officers after he was read the Miranda warnings.

Defendant's Motion Suppress (#48) advocates that the search conducted by the law enforcement officers violated his constitutional rights and that any statements elicited by the officers should be suppressed as "fruit of the poisonous tree." Defendant contends that any statements made by him to the officers were involuntary and should be suppressed.

Defendant's brief begins with a discussion of various facts regarding the search warrant and the entry of the Defendant's home. The brief then sets forth the language of the Fourth Amendment and mentions facts attested to by the attesting officer in the search warrant. Following this introduction, the Defendant notes that the Fourth Amendment and 18 U.S.C. § 3109 require officers conducting searches pursuant to a search warrant to "knock and announce" before they are allowed to forcibly enter a search location. Defendant then claims he never heard the officers "knock and announce" and that "[b]ecause the requirements of the 'announcement' of Title 18 U.S.C. § 3109 were not met, fruits of the search, drugs, firearms and confession, must be suppressed as 'fruit of the poisonous tree.'" (Def.'s Mot. to Suppress (#48) at 6, lines 14-16.) The Defendant cites, *inter alia*, *Ker v. California*, 374 U.S. 23 (1963), *Sabbath v. United States*, 391 U.S. 585 (1968),

and *Wong Sun v. United States*, 371 U.S. 471 (1963), in support of this argument.

The Defendant's final argument contends that his confession must be suppressed as violation of his Fourth and Fifth Amendment rights. He claims that the confession was not voluntary because he was "highly intoxicated" when he was interrogated by the officers. He reminds that Court to consider the totality of the circumstances, including the history, education, and physical condition of the Defendant. He cites *Crane v. Kentuky*, 476 U.S. 683 (1986), and *Mincey v. Arizona*, 437 U.S. (1978), in support of this argument.

The Government's response sets forth its version of the facts, and then argues that the officers who entered the Defendant's home did not violate 18 U.S.C. § 3109, citing *United States v. Lockett*, 919 F.2d 585 (9th Cir. 1990), *United States v. Zermeno*, 66 F.3d 1058 (9th Cir. 1995), and *United States v. Mendonsa*, 989 F.2d 366 (9th Cir. 1993). The Government provides the language of 18 U.S.C. § 3109, and it then indicates that the amount of time an officer must wait before making a forcibly entry after knocking and announcing depends on the circumstances of each case, citing *United States v. McConney*, 728 F.2d 1195 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824 (1984). The Government claims that the officers waited for sufficient amount of time before making their forced entry.

The Government contends that the Defendant's confession was voluntary. It argues that even if the Defendant was intoxicated, his confession was still rational and not against his free will. The Government represents that the Defendant's confession was voluntary because he had the presence of mind to answer some question but not others. The Government refers

the Court to *Modeiros v. Shimoda*, 889 F.2d 819 (9th Cir. 1989), and *United States v. Kelly*, 953 F.2d 562 (9th Cir. 1992(in support of this argument.

Finally, the Government proposes that the Defendant knowingly, intelligently, and voluntarily signed the waiver of rights form, citing *United States v. Andaverde*, 64 F.3d 1305 (9th Cir. 1995). The Government reminds the Court that it must consider the totality of the circumstances, citing *Terrovona v. Kinchloe*, 912 F.2d 1176 (9th Cir. 1990). The Government also refers the Court to *United States v. George*, 987 F.2d 1428 (9th Cir. 1993), and *United States v. Martin*, 781 F.2d 671 (9th Cir. 1985), in representing that although an individual may be under the influence, a confession may still be voluntary. The Government also contends that coercive police activity is necessary for a confession to be involuntary, briefly discusses *Colorado v. Connelly*, 479 U.S. 157 (1986), and argues that the Defendant in this case was not coerced.

SUMMARY OF FACT AND PROCEDURE

At the evidentiary hearing, the Government called two witnesses: Officer Wilson Crespo and Officer Richard Tomaso. The Defendant also took the stand and testified on his own behalf. The testimony offered by these witnessess is summarized as follows:

After obtaining a search warrant authorizing a search of the Defendant's residence, officers of the North Las Vegas Police Department and the Federal Drug Task Force arrived at the home of the Defendant at approximately 2 p.m. on July 15, 1998 to execute the search warrant. Some officers were dressed in SWAT gear, while others were in street clothes. Officer Crespo testified that the officers knocked "loudly" on

the Defendant's door and "authoritatively" announced they were police officers. The officers heard no response from inside the apartment. They proceeded to wait according to Officer Crespo, "at least fifteen seconds," and according to Officer Tomaso, twenty seconds. The officers which comprised the entry team then made a forced entry into the apartment using a battering ram of some sort. The Defendant testified that he was in the shower when he heard a "boom," and indicated that he thought someone "shot the door open."

Upon entering the apartment, the officers, some of which were dressed in black, hooded SWAT team uniforms with masks, repeatedly identified themselves as police officers while they secured the apartment. The Defendant was found in the hallway area, wet, naked, and covered with soap. The Defendant declared that he never hear [*sic*] the "knock and announce" and that he came out the bathroom when he heard the "boom." At least one officer drew his weapon, and at least one officer yelled, "police" and ordered the Defendant to lie on the ground which he did. An officer then placed his knee and weight into the Defendant's back. The Defendant was then placed under arrest, handcuffed, and taken to the kitchen area of the apartment. According to Officer Crespo, the Defendant was given something to cover himself with immediately.[1]

The Defendant was advised of his constitutional rights. Officer Tomaso advised the Defendant of his rights orally, and the Defendant was also given a document which listed his constitutional rights. Officer

[1] Officer Tomaso testified that the Defendant was given a towel, and the Defendant testified he was given some underwear.

Tomaso stated that the Defendant was asked if he wished to waive his constitutional rights. The Defendant testified that he was given the Miranda warnings orally, and that he remembered being presented with the advice of rights form, but he did not recall reading or discussing the advice of the rights form. However, Officer Tomaso testified that he witnessed the Defendant's sign the waiver of rights form, entered as an exhibit, is signed with the Defendant's name. Tomaso also testified that the Defendant indicated that he would like to cooperate with the officers and that the Defendant states he would be willing to answer some questions but not others. Furthermore, according to Officer Tomaso, although the Defendant asserted that he wanted to consult a lawyer before accepting a "deal," he indicated after further inquiry that he was willing to discuss his own culpability and did not ask for an attorney for questioning. On direct examination the Defendant stated that he told the officers he wished to talk to an attorney before continuing with the interview. On cross-examination, however, the Defendant indicated that he wanted to talk to an attorney before he responded regarding his suppliers, but that he was willing to answer other questions, particularly regarding his family and the possibility of a search of his mother's house, without consulting an attorney. The Defendant also testified that he asked the officers if he could contact a girlfriend to watch his apartment while he left with the officers, and he was allowed to do so.

Officer Crespo and Officer Tomaso testified that the Defendant was able to understand, respond to, and answer questions. Officer Crespo also indicated that the Defendant spoke well, his speech was not slurred, nor were his eyes red or droopy. Officer Crespo stated

that the officers had no reason to believe the Defendant was under the influence of any substances, thus a breathalyzer or other sobriety test was not administered. The Defendant, on the other hand, implied that he was drunk by testifying that he had been "drinking, snorting cocaine and smoking weed" all night and all morning. The Defendant also testified that he was able to shower without any problem.

The officers also explained why they did not tape record the interview of the Defendant, indicating that it was for the Defendant's personal safety in case he "gave up" others involved in criminal activities, such as his drug supplier, and that it was the policy of the FBI to not tape record such interviews or interrogations.

DISCUSSION

The Court is confronted with three issues: whether the knock and announce procedures and entry into the Defendant's apartment by the officers were appropriate, whether the Defendant knowingly and intelligently waived his Fifth Amendment rights despite his alleged intoxication, and whether the Defendant invoked the right to counsel while being questioned by the officers.

First, this Court concludes that the officers complied with the knock and announce requirement of 18 U.S.C. § 3109, and that the officers did not violate the Defendant's constitutional rights when they entered the Defendant's apartment. The knock and announce rule states as follows:

> The officers may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

18 U.S.C. § 3109. In sum, the statute requires law enforcement officers to notify the occupants of a dwelling of the officer's purpose and authority before he may enter to execute a search warrant, and the officer must be denied access before he may forcibly enter the house. "A failure to answer a knock and announce has long been equated with a refusal to admit the search party and a justification for forcible entry. (Citation omitted)." *United States v. Ramos*, 923 F.2d 1346, 1356 (9th Cir. 1991). The Ninth Circuit, after reviewing whether an officer must wait for a specified period of time before he is deemed to have been refused admittance and may make a forced entry, stated, "There are no set rules as to the time an officer must wait before using force to enter a house; the answer will depend on the circumstances of each case." *United States v. Phelps*, 490 F.2d 644 (1974), *cert. denied*, 419 U.S. 836 (1974) (quoting *McClure v. United States*, 332 F.2d 19, 22 (9th Cir. 1964). The Ninth Circuit has upheld the validity of searches where the delay was ten seconds or less. *Phelps*, 490 F.2d at 647 (finding that after hearing movement inside the residence followed by a wait of five to ten seconds justified forcible entry); *United States v. Allende*, 486 F.2d 1351, 1353 (9th Cir. 1973) (finding that a forcible entry after hearing scampering sounds and waiting ten seconds was justified). Here, the officers complied with the knock and announce statute. They knocked loudly on the Defendant's door, authoritatively announced they were police officerd, and waited for fifteen to twenty seconds. Fifteen to twenty seconds is a reasonable amount of time for an occupant to respond to an announcement.

Moreover, considering the circumstances surrounding the search, that the warrant authorized a search of the premises for property including cocaine, and, in particular, the lack of response from within the apartment, fifteen to twenty seconds was a sufficient waiting period before entering the apartment by force.

Second, the Court is convinced that the Defendant knowingly and intelligently waived his constitutional rights. "Under both the fifth and sixth amendments, waiver must be voluntary and a knowing and intelligent relinquishment of a known right or privilege." *Norman v. Ducharme*, 871 F.2d 1483, 1486 (9th Cir. 1989) (citing *Brewer v. Williams*, 430 U.S. 387, 404 (1977)). The Government cited Ninth Circuit language regarding the voluntariness of a confession as it relates to intoxication; the language reads, "A confession is voluntary if it is "'the product of a rational intellect and free will' . . . whether [or not] a confession is the product of physical intimidation or psychological pressure [or] a drug- [alcohol] induced statement. (Citations omitted)." *Modeiros v. Shimoda*, 889 F.2d 819, 823 (9th Cir. 1989) (brackets and ellipsis in original). While the Court acknowedges that intoxicating substances may impair an individual's senses, a decision to waive one's rights or confess is voluntary if it is the product of a rational intellect and free will, regardless of whether the decision is made while under the influence. Here, the Defendant claims he lacked the rational intellect and free will to knowingly and intelligently waive his constitutional rights because he was under the influence of cocaine, marijuana, and alcohol. His actions, however, are contrary to this statement. The Defendant's actions indicate that he was capable of making reasoned decisions. The officers testified that the Defendant was

able to speak clearly, follow instructions, and carry on a conversation. Furthermore, the Defendant's own testimony indicates that he knowingly called a girlfriend to watch his apartment while he left with the police officers–a reasoned decision, and he consciously reasoned with the officers regarding his desire to speak with a lawyer before he agreed to "give up" the identity of his suppliers. The Court finds that the Defendant was not so intoxicated that this rational intellect and free will was inhibited and that any statements made by the Defendant were knowing and voluntary. The Defendant was informed both orally and in writing of his constitutional rights, and he knowingly and intelligently waived those rights. As a result, any statements made by the Defendant to the officers should not be suppressed.

Finally, the Court is not persuaded that the Defendant invoked his right to counsel while being questioned by the officers. The fifth amendment right to counsel applies during custodial interrogation, *Miranda v. Arizona*, 384 U.S. 436 (1966), and if a suspect indicates in any manner that he wishes to consult with an attorney before speaking, there can be no further questioning. *Id* at 474. The Ninth Circuit, however, in interpreting *Miranda*, held that police may clarify an ambiguous or equivocal request for an attorney made by a suspect. *United States v. Fouche*, 833 F.2d 1284 (9th Cir. 1985), cert. denied, 486 U.S. 1017 (1988) (finding that a police initiated conversation after an equivocal request for an attorney does not automatically void a subsequent confession if the police questions are fairly designed to clarify the ambiguity). Moreover, "a defendant may selectively waive his Miranda rights, deciding 'to respond to some questions but not others,'" *Bruni v.*

Lewis, 847 F.2d 561, 564 (9th Cir. 1988), *cert. denied*, 488 U.S. 960 (1988), and mere mention of an attorney does not suffice to render a statement as an equivocal request for counsel, as the word attorney is not "talismanic." *Id.* at 564. The Defendant did mention he wished to speak to an attorney. Rather, according to Officer Tomaso, the Defendant indicated that he was willing to answer some questions but not others. Moreover, the Defendant's request to speak with an attorney before agreeing to a plea bargain was not a clear request invoking the Fifth Amendment right to counsel. Consequently, the officers made further inquiry, and this inquiry, according to both Officer Tomaso and the Defendant himself, indicated that although the Defendant wanted to consult with an attorney before accepting a "deal," he was still willing to discuss other matters with the officers and respond to questions not relating to a plea bargain. Accordingly, the Court finds that the Defendant did not invoke his right to counsel, and even if he had invoked the right, his willingness to answer other questions constituted a waiver of the right.

RECOMMENDATION

Based on the foregoing, it is the recommendation of the undersigned United States Magistrate Judge for the District of Nevada that Defendant LaShawn Lowell Banks's **Motion to Suppress** (#48) be **denied.**

Dated March 9, 2000.

/s/ ROGER L. HUNT
ROGER L. HUNT
United States Magistrate Judge

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-10439
DC No. CR-9800269-JBR

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

LASHAWN LOWELL BANKS, DEFENDANT-APPELLANT

Before: POLITZ,* W. FLETCHER, and FISHER, Circuit Judges.

Judges Politz and W. Fletcher have voted to deny the petition for rehearing, and Judge Fisher has voted to grant the petition for rehearing.

Judges W. Fletcher and Fisher have voted to deny the petition for rehearing en banc; and Judge Politz so recommends.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc.

Fed. R. App. P. 35.

* Honorable Henry A. Politz, Senior United States Circuit Judge for the Fifth Circuit Court of Appeals, sitting by designation.

The petition for rehearing and the petition for rehearing en banc, filed April 19, 2002, are **DENIED.**

EDITOR'S NOTE

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02-473

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IN THE SUPREME COURT OF THE UNITED STATES

* * *

UNITED STATES OF AMERICA,

Petitioner,

v.

LASHAWN LOWELL BANKS,

Respondent.

MOTION TO PROCEED *IN FORMA PAUPERIS*

COMES NOW the Respondent, Lashawn Lowell Banks, by and through his appointed counsel, Randall J. Roske, Esquire and respectfully moves this Honorable Court for its order permitting the Respondent to proceed *in forma pauperis*. The motion is supported by the affidavit of counsel and memorandum of points and authorities.

DATED this January 23, 2003.

Respectfully submitted,

Randall J. Roske, Esquire
511 South Tonopah Drive
Las Vegas, Nevada 89106-4026
Attorney for Respondent,
LASHAWN BANKS

MEMORANDUM OF POINTS AND AUTHORITIES

I. THE FACTS

The Respondent, Lashawn Lowell Banks, originally retained private counsel through is family to represent him in United States District Court (please see affidavit of counsel attached as Exhibit A for these and the following facts). After pleading guilty he requested appointment of new counsel. Mr. Banks executed the appropriate affidavit of financial condition under the Criminal Justice Act, Title a18 U.S.C. §3006A. This form is commonly denominated as a "CJA form 23." The district court determined that Mr. Banks qualified for the appointment of counsel under the provisions of title 18 U.S.C. §3006A as a person who was without the means to retain counsel. The office of the Federal Public Defender was thereafter appointed to represent the Respondent, who was then pending sentencing in district court. Due to conflicts with his assigned assistant federal public defender, this author was appo.nted counsel to represent Respondent as a Criminal Justice Act panel attorney. This author has represented respondent under the Criminal Justice Act appointment in district court and the United States Court of Appeals for the Ninth Circuit. Mr. Banks presently is out of custody dn supports his two children as a laborer for a tile and marble firm in Las Vegas, Nevada. Mr. Banks does not have the financial means to pay the costs of printing briefs, let alone defer the costs of counsel in the Supreme Court of the United States.

DATED this January 23, 2003.

Respectfully submitted.

Randall J. Roske, Esquire
511 South Tonopah Drive
Las Vegas, Nevada 89106-4026
Attorney for Respondent,
LASHAWN BANKS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is a person of such age and discretion as to be competent to serve papers. That on January 23, 2003, she served a copy of the above and foregoing motion by placing said copy in a postpaid envelope, addressed to the person(s) hereinafter named, at the address(es) stated below, which is/are the last known address(es), and by depositing said envelope and contents in the United States mail at Las Vegas, Nevada or by hand delivery

Addressee: Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Helena Bozzo

No. 02-473

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, PETITIONER

v.

LASHAWN LOWELL BANKS, RESPONDENT

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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The respondent, Lashawn Lowell Banks, by and through his appointed counsel, Randall J. Roske, respectfully submits his brief in opposition to the Solicitor General of the United States of America's petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 282 F.3d 699 (9th Cir. 2002). The district court's order denying respondent's motion to suppress is unreported, as is the recommendation and report of the magistrate judge advising the district judge to deny respondent's suppression motion after evidentiary hearing. These documents are set forth in the Appendix of the petitioner, infra 20a-21a and 22a-32a, respectively.

JURISDICTION

Respondent concedes that the request for this Court to accept jurisdiction of this case is properly presented under Title 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Title 18 of the United States Code Section 3109 states:

Breaking doors or windows for entry or exit:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

COUNTER STATEMENT

Respondent was indicted for possession of a controlled substance with intent to distribute, a violation of Title 21 U.S.C. §841(a)(1), (count one) and with possession of a firearm as an unlawful drug user, a violation of Title 18 U.S.C. §922(g)(3). Respondent filed a motion to

suppress the evidence obtained in violation of the Fourth Amendment and the "knock-and-announce" statute, Title 18 U.S.C. §3109. An evidentiary hearing was held by the magistrate judge who issued a recommendation and report to the district court that the respondent's motion be denied. The district court judge thereafter denied respondent's motion. Respondent plead guilty to both counts of the indictment reserving the right to appeal the denial of his suppression motion. Respondent was sentenced to serve 11 years and three months by the district court. A timely appeal was taken to the Court of Appeals for the Ninth Circuit. The Court of Appeals reversed the district court's denial of the suppression motion on Fourth Amendment grounds after careful examination of all the undisputed facts of this case. The Court of Appeals recognized that the forcible entry here was made in the absence of exigent circumstances. The court of appeals examined all relevant factors and concluded that under the facts unique to this case, the officers executing the warrant had failed to wait a sufficient amount of time before inferring a refusal of admittance.

1. The facts adduced at the evidentiary hearing are as follows:

Sometime in early July of 1998, a joint state and federal drug task force (the North Las Vegas Federal Drug Task Force) received word from a confidential informant that a person known as "Shakes" was selling cocaine and the informant believed he could make a controlled purchase. The informant related that "Shakes" lived at 1404 Henry Drive, apartment D, in North Las Vegas, Nevada. Officer Crespo of the North Las Vegas Police Department arranged for $200 from the narcotics buy fund to have the informant make a controlled buy. He then searched the informant for money and drugs before supplying the $200 to the informant. Officer Crespo then drove him to the 1404 Henry Drive apartment. The informant then went into apartment "D" and returned a short while later with two large off white rocks of cocaine. The informant identified the seller as "Shakes." No further identifying information was provided.

Officer Crespo sought a search warrant for 1404 Henry Drive, apartment D on July 8, 1998. This warrant was authorized by the justice of the peace on the same day. The warrant

described apartment D as a two bedroom upstairs apartment.

On July 15, 1998, at 2 p.m. the members of the joint task force assembled to raid respondent's apartment. Officer Crespo, along with members of the SWAT team, was stationed at the entrance to apartment D. The members of the SWAT team were wearing tactical assault garb, including hoods or masks to disguise their identity. The entry team was armed with fully automatic weaponry. FBI Agent Tomasso was stationed at the rear of the apartment building and apparently could hear the entry team. The officers executing the warrant did not know whether anyone was in the apartment. Officer Crespo knocked loudly and announced "Police, search warrant" in a loud authoritative tone. Officer Crespo did not hear anything back. Officer Crespo waited "at least 15 seconds" before ramming open the apartment door." FBI Agent Tomasso who was stationed at the rear of the apartment, opined that the time interval was "I think twenty seconds, maybe." When the door flew open respondent was found wet, soapy and naked a few steps from the bathroom.

Respondent testified that he was taking a shower when he heard a loud "boom." He heard no knock or announcement, but did hear a loud noise of the battering ram. He turned off the water and stepped out of the bathroom when in came rushing masked men in black outfits armed with guns. Respondent was immediately proned out, face down by an armed man. He did not know whether the man was a robber or a police officer. Thereafter, respondent was handcuffed and taken naked to the kitchen table for interrogation. Meanwhile, the SWAT team conducted the search of his apartment. Drugs, weapons and other evidence were located in respondent's apartment. Respondent was the sole occupant of apartment D.

2 A majority of the judges acting as a three judge panel reversed the district court's denial of respondent's motion to suppress.[1] The majority opinion was written by Judge Henry A. Politz, a senior judge of the Fifth Circuit Court of Appeals sitting by designation in the Ninth

[1] The suppression motion raised Fifth and Sixth Amendment issues which were rejected by the court of appeals, and are not the subject of the petition before this Court.

Circuit Court of Appeals.

The petitioner notes that in the decision below, that the Court cited four general categories of knock-and-announce cases (see Pet. at 4-5). Petitioner incorrectly states: "The majority set forth four categories of knock-and-announce cases, each requiring a different lapse of time before an officer may enter a residence after knocking and receiving no response." The Petitioner then quotes the decision below, *United States v. Banks*, 282 F 3d 699 at 705, (9th Cir. 2002), App. 5a:

> (1) entries in which exigent circumstances exist and non-forcible entry is possible, permitting entry to be made simultaneously with or shortly after announcement; (2) entries in which exigent circumstances exist and forced entry by destruction of property is required, necessitating more specific inferences of exigency; (3) entries in which no exigent circumstances exist and non-forcible entry is possible, requiring an explicit refusal of admittance or a lapse of a significant amount of time; and (4) entries in which no exigent circumstances exist and forced entry by destruction of property is required, mandating an explicit refusal of admittance or lapse of an even more substantial amount of time.

The majority in *Banks* did not refer to the four basic categories as setting "a different lapse of time before an officer may enter a residence after knocking and announcing and receiving no response" as argued by the petitioner (See Pet. at 4). The majority referred to the consideration of the four basic categories as "aids in the resolution of the essential question whether the entry made herein was reasonable under the circumstances" under Title 18 U.S.C. §3109 (See *Banks* 282 F.3d at 705; App. 6a). The majority explicitly noted "'there are no set rules as to the time an officer must wait before using force to enter a house; the answer will depend on the circumstances of each case'" [See, *Banks* at 704-705; App 5a; c.f. *McClure v. United States*, 332 F 2d 19, 22 (9th Cir. 1964)]. The "four categories of entries" under Title 18 U.S.C. §3109 referred to by the majority in *Banks* are distilled from the case of *Bustamonte-Gamez*, 488 F.2d 4, 9 (9th Cir. 1973), and is an effort to take into account the interests served by Title 18 U.S.C. §3109 in "(a) reducing the risk of harm to both the officer and the occupants of the house to be entered; (b) helping to prevent the unnecessary destruction of private property; and symbolizing respect for individual privacy summarized in the adage that 'a man's home is his castle.'" *Banks*,

282 F.3d at 705; App. 5a, citing *Bustamonte Gamez*, 488 F.2d 4, 9 (9th Cir. 1973), quoting *Miller v. United States*, 357 U.S. 301, 307 2L.Ed.2d 1332, 78 S.Ct. 1190 (1958).

The majority in *Banks* noted that the officer's entry was made after knocking and announcing their authority and purpose. The question presented in *Banks* is whether the officers could reasonably infer a refusal of admittance from the passage of a mere 15-20 seconds under a totality of the circumstances surrounding the execution of the warrant (See, *Banks*, 282 F.3d at 705; App. 7a)

The majority in *Banks* concluded, after a careful examination of the record, no exigent circumstances existed (see, 282 F.3d at 704, ft.nt. 3; App. 6a). Exigent circumstances exist when "'there [is] a likelihood that the occupants [will] attempt to escape, resist, destroy evidence, or harm someone within . . . .'" [Id., c.f. *United States v. McConney*, 728 F.2d 1195, 1204-05 (9th Cir. 1984) (en banc opinion)]. The petitioner notes the *Banks* majority's conclusion that no exigent circumstances specific to the case existed, but does not squarely explain why this conclusion is wrong. The *Banks* majority opinion articulated a series of non- exclusive factors to determine whether, under the totality of the circumstances, the duration of the officer's pause was reasonable (282 F.3d at 704; App. *infra* 6a-7a). These factors are:

> (a) size of residence; (b) location of the residence; (c) location of the officers in relation to the main living areas of the residence (d) time of day; (e) the nature of the suspected offense; (f) evidence demonstrating the suspect's guilt; (g) suspect's prior convictions and; if any, the type of offence for which he was convicted; and (h) any other observations triggering the senses of the officers that reasonably would lead one to believe that immediate entry was necessary. (Id. App. 6a-7a).

The majority opinion in *Banks* conducted the following analysis:

> In the case before us, the officers knocked once and announced their purpose. The officers heard no sound coming from the small apartment that suggested that an occupant was moving away from the door, or doing anything else that would suggest a refusal of admittance. We know from the record sounds were transmitted relatively easily for [FBI Agent] Tomasso, waiting outside at the rear of the apartment, heard Officer Crespo's knock at the front door. Yet none of the officers testified that they heard any sound coming from within the apartment. There was nothing else that triggered the officers' senses, and there were no exigent circumstances warranting a waiver of the reasonable delay. The officers had no specific knowledge of any facts or reasonable expectations from which they could reasonably have believed that entry into Bank's residence would pose any risk greater than the ordinary danger of executing a search warrant on a private residence.
>
> Because the officers were not affirmatively granted or denied permission [to enter], they were required to delay acting for a sufficient period of time before they could reasonably conclude that they impliedly had been denied admittance. After pausing a maximum of fifteen to twenty seconds, the officers forced entry. Banks came out of his shower upon hearing the sound of his door being forced open, and stumbled into the hallway concerned that his apartment was being invaded. Upon entering, the officers found Banks naked, wet and soapy from his shower. Under these circumstances, we are not prepared to conclude that the delay of fifteen to twenty seconds after a single knock and announcement before forced entry was, without an affirmative denial of admission or other exigent circumstances, sufficient in duration to satisfy the constitutional safeguards.

Banks, majority opinion, 282 F.3d at 705-706; App. *infra* 7a-8a). Several facts not mentioned by the majority opinion, are that the officers had no knowledge of any other occupant of the apartment, except the person identified as "Shakes," and that at the time of the warrant's execution the officers were unsure of whether anyone was, in fact, home. There was no evidence adduced that surveillance was established anytime except just prior to the warrant's execution. Further, beyond identifying the place to be searched as a two bedroom apartment, its exact layout prior to the search, was apparently unknown.

The petitioner concedes that the majority opinion in *Banks* "did not indicate how much delay before entering was necessary to satisfy the Fourth Amendment." (Pet. 6). The dissenting Judge Fisher, in his opinion, criticized the majority opinion in *Banks* as neglecting to address all of the factors it identified as relevant to the inquiry. Judge Fisher was referring to the non-exclusive list of factors set forth by the majority opinion. 282 F.2d at 705; App. *infra* 14a-19a). Judge Fisher specifically identified, as "discounted factors:" (a) [the] size of the residence;" "(c) location of the officers in relation to the main living or sleeping areas of the residence;" and "(e) [the] nature of the suspected offense." Judge Fisher, in his dissent, admits "this case is a close call" and acknowledges "it is disquieting to visualize Banks' shock and embarrassment as he emerged naked and still soapy from his shower and confronted the officers who had just burst through his front door." (282 F.3d at 707; App. *infra* 11a). The dissenting judge's claim that the majority opinion failed to give weight to the factors identified as the size of the residence,

location of the officers and the nature of the offense is offset by the other facts specific to *Banks*. Even in a small apartment, an individual who is in the shower or using the bathroom cannot be *reasonably* expected to answer the door in twenty seconds or less. Law enforcement officers set the timing of their raids. They are calculated to take the occupants (or here the sole occupant) off guard.

It is conceded by Judge Fisher in his dissent that, "there is no Ninth Circuit precedent directly on point." (282 F.3d at 709; App. *infra* 16a). The dissenting judge then cites cases outside the controlling circuit, to justify entries anywhere from 10 to 20 seconds after the knock. Without addressing each case here individually, these cases all have significantly different fact patterns making them distinguishable from the case at bar. Petitioner seizes on Judge Fisher's comment that the majority provides no meaningful guidance to law enforcement officers. (Pet. 6). As will be addressed more fully below, this Court's cases teach that there are no set rules for what is a reasonable delay under the Fourth Amendment principles. Where the police are confronted with no explicit refusals of admittance by a sole occupant of a dwelling, it may be necessary for them to pause to consider that the person may be engaged in a private activity which society recognizes would prevent a prompt response to the door.

REASONS FOR DENYING THE PETITION

A. The *Banks* Majority Opinion is Consistent With This Court's Precedent.

The decision of the majority in *Banks* does not create a "rigid, categorical approach" to Fourth Amendment analysis as claimed by Petitioner (Pet 7). The "four categories" identified in the majority opinion in *Banks* are intended to be "aids in the resolution of the essential question whether the entry made herein was reasonable under the circumstances." (*Banks*, 282 F.3d at 704, App. *infra* 5a-6a). The guidance offered by the *Banks* majority was merely an analytical distillation of cases interpreting the interests served by the knock-and-announce statute, Title 18 U.S.C. §3109 (*Banks*, 282 F.3d at 705; App. *infra* 6a). The petitioner overstates the significance of the guidelines and glosses over the fact that the majority opinion utilized a *totality of the*

circumstances test to determine reasonableness under Fourth Amendment standards (*Banks*, 282 F.3d at 705; App. *infra* 6a). There is no rigid categorical approach as argued by petitioner in the *Banks* opinion which mandates announcement in derogation of this Court's opinion in *Wilson v. Arkansas*, 514 U.S. 927, 934 (1995) (Pet. 7). In *Wilson*, this Court addressed the Arkansas Supreme Court's finding that there is no authority for the proposition that the common law knock-and-announce principle formed a part of the Fourth Amendment reasonableness inquiry. In *Wilson*, this Court was presented with a state court prosecution predicated on evidence seized on a search warrant executed by the police. The facts there involved an informant who made a series of purchases of drugs from Ms. Wilson. On the last drug buy, Ms. Wilson waved a gun in the informant's face and threatened to kill her if she was working for the police. Search warrants were obtained and the police executed the warrant without making any knock-and-announcement. After entering, the police found Ms. Wilson in the bathroom flushing drugs down the toilet. Ms. Wilson filed a motion to suppress claiming, among other things, that the officers executing the warrant failed to knock-and-announce their purpose. This Court, in a unanimous opinion, authored by Justice Thomas, reversed the Arkansas Supreme Court's affirmance and remanded the matter for determination below whether the search might be constitutionally defective or if law enforcement interests may establish the reasonableness of an unannounced entry. *Wilson*, 514 U.S. at 936. The remand was made despite the State of Arkansas and the Solicitor General's argument that the record sufficiently justified the entry because of the reasonable belief, by the officers, that a prior announcement would place them in peril and the potential that evidence would be destroyed (Id. 514 U.S. at 937)

The respondent argues that "by making the amount of time that officers must wait vary according to whether execution of a warrant requires property damage" is at odds with this Court's decision in *United States v. Ramirez*, 523 U.S. 65, 71 (1998) (Pet. 7). First, to the extent that the majority opinion in *Banks* refers to a guideline addressing absence of property damage, the holding does not turn on this factor because *Banks* involves the damage of property. The

distinction made in the guidelines discussed by the majority opinion in *Banks* does not place the decision at odds with this Court's decision in *Ramirez*. This Court's decision in the *Ramirez* case teaches that the Fourth Amendment does not hold officers to an enhanced or higher standard of showing of exigent circumstances where a "no knock" entry results in the destruction of property. 523 U.S. 65 at 71. The insistence on a heightened showing of exigency was the basis of the decision by the court of appeals that the fruits of the search were a result of a Fourth Amendment violation. In *Ramirez*, the Chief Justice delivered a unanimous opinion of the Court. The case involved a police search for a violent escapee who was believed to be at the *Ramirez* residence. The escapee, according to an informant, had guns and drugs stashed in the garage. The Chief Justice, speaking for this Court, rejected the notion that a heightened standard of exigency applies to a no knock if the entry requires destruction of property. The instant case addresses a different issue under Title 18 U.S.C. §3109, which is whether under the totality of the circumstances the officers paused sufficiently before inferring a refusal of admittance. The *Ramirez* case involved particularized facts which the officers used to form a reasonable suspicion that knocking and announcing would be "dangerous" and "destructive" to the purposes of the investigation. The majority's guideline in *Banks*, addressing whether an entry can be made without a breaking, is certainly a relevant factor to consider under a totality of the circumstances test. If Mr. Banks' door was open and no breaking occurred, this logically should have some significant place in a court's consideration whether under the Fourth Amendment standards the officers had paused sufficiently before entering.

The *Ramirez* decision cites *Richards v. Wisconsin*, 520 U.S. 385, 117 S.Ct. 1416, 137 L.Ed.2d 615 (1997). In *Richards*, this Court was confronted with a blanket exception to the knock-and-announce requirement under common law principles. In *Richards*, the police executed a search warrant on a motel room in connection with a drug investigation. The State Supreme Court adopted a *per se* rule that police officers are never required to knock-and-announce when executing a warrant in a felony drug investigation. The rationale for this rule of

the State Supreme Court was based upon generalizations about today's drug culture. Justice Stevens delivered the unanimous decision of this Court, while affirming that under facts specific to the case, held that there was no constitutional violation. In *Richards*, this Court reaffirmed the principle that *specific* information of exigent circumstances can justify dispensing with the knock-and-announce rule while generalized concerns, dangerousness or destruction of evidence do not. 520 U.S. at 392. This Court in *Richards*, reaffirmed the need for *case by case* evaluation of the manner in which a search is conducted. Justice Stevens in footnote 4 stated:

> It is always somewhat dangerous to ground exceptions to constitutional protections in the social norms of a given historical moment. The purpose of the Fourth Amendment's requirement of reasonableness "is to preserve that degree of respect for the privacy of persons and the inviolability of their property that existed when the provision was adopted - - even if a later, less virtuous age should become accustomed to considering all sorts of intrusion 'reasonable.'" *Minnesota v. Dickerson*, 508 U.S. 366, 380, 124 L.Ed.2d 334, 113 S.Ct. 2130 (1993) (Scalia, J., concurring). 520 U.S. at 393.

A reading of the *Richards'* case reflects that it was the state and petitioner who were urging this Court to adopt a rigid rule dispensing with the knock-and-announce rule in felony drug investigations. Before leaving the *Richards* case, an analysis of the privacy interests served by the knock-and-announce rule is setforth in footnote five of the *Richards* opinion, Justice Stevens pointed out:

> when police enter a residence without announcing their presence, the residents are not given any opportunity to prepare themselves for such an entry . . . [t]he brief interlude between announcement and entry with a warrant may be the opportunity that an individual has to pull on clothes or get out of bed.

520 U.S. at 393. This same privacy concern is given meaning by the requirement that the searching officers are to pause a reasonable period of time before inferring a refusal of admittance.

Petitioner argues that the *Ramirez* case holds that the lawfulness of an entry does not depend on a special showing of "reasonable suspicion" where property is destroyed to effectuate a no knock entry and that it, "follows that the prospect of property destruction does not require additional delay in the circumstances presented here." (Pet. 12) This logic is flawed. It

compares apples to oranges. The *Ramirez* case addressed the issue of whether a heightened showing of exigent circumstances or reasonable suspicion is necessary to justify a "no knock" destructive entry. The *Banks* majority opinion did not address the issue of reasonable suspicion justifying a shortened pause between the announcement and the forcible entry. In *Banks*, no reasonable suspicion of exigent circumstances were found to be present. No particularized fact existed which justified a hastened entry in *Banks*. The generalized concerns for officer safety and destruction of evidence were the driving factors in the officers' decision to effectuate a forcible entry in 20 seconds or less. These generalized concerns were the same ones rejected by this Court in *Richards* as a basis to dispense with the knock-and-announce requirement in all drug cases. The petitioner strains to make the *Banks* case the *Ramirez* case. They involve two very different issues of fact and law under the knock-and-announcement statute, Title 18 U.S.C. §3109.

B. The *Banks* Decision Presents a Fact Specific Resolution of What Constitutes a Reasonable Pause Before Making a Forcible Entry. The *Banks* Decision Does Not Create a Conflict with Decisions of Other Courts of Appeals.

Petitioner argues that the *Banks* majority opinion conflicts with the decisions of other circuit courts (Pet. 12). This is not so. The *Banks* majority opinion is based upon the unique matrix of facts presented in this case. The case does not establish any set times for law enforcement to pause, it simply found that under the totality of the circumstances presented in this case, that the 20 second or less pause between announcement and forcible entry was not reasonable. All of the cases cited by the petitioner are distinguishable.

Here, the officers were executing a search warrant in a drug investigation. The apartment in question was occupied by only one person. While the search of the two bedroom upstairs apartment occurred at two in the afternoon, the officers executed the warrant at a time when Mr. Banks was taking a shower. No particularized suspicious exigent circumstances were known to the officers and no affirmative refusal of entry occurred. Mr. Banks testified that he heard no knock-and-announcement just the boom of the door being rammed in. None of the cases cited by

the petitioner present these unique set of facts. Since the totality of the circumstances takes into account facts not found in other circuit court opinions, there is no actual "conflict" between circuit courts.

The first case cited by petitioner is *United States v. Lucht*, 18 F.3d 541, (8th Cir. 1994). In *Lucht*, the police executed numerous search warrants in a large scale drug investigation. Several search warrants were executed without any knock-and-announcement due to the existence of exigent circumstances. See *Lucht*, 18 F.3d. at 549. One home that was searched was small (the Volkir and Runsey residence). The two occupants were awake and "the possibility was slight that those within did not hear or could not have responded promptly." Id at 549. There is no mention in *Lucht* of the occupants taking a shower. Further, where there is more than one occupant, it is very unlikely they will be showering together, thus rendering it unreasonable to expect that an occupant could respond in 20 seconds or less. It is worth noting that the Ninth Circuit addressed a very similar fact pattern knock-and-announce case decided *after Banks*. This case is *United States v. Chavez-Miranda*, 306 F.3d 973 (9th Cir. 2002). In *Chavez-Miranda*, the DEA executed a search warrant after making controlled buys. The search warrant execution occurred at 6:15 p.m. on a small two bedroom apartment less than 800 square feet in area. The officer there conducted the knock-and-announcement in both English and Spanish. No response to the announcement was forthcoming. After 20 to 30 seconds the door was forced open. The Ninth Circuit noted the similarities between the *Banks* case and its fact pattern in *Chavez-Miranda* 306 F.3d 973 at 980-81. In *Chavez-Miranda* the court noted:

> We note that there are a number of similarities between *Banks* and this case. In both cases the apartments were small and the narcotics warrants were being executed at a time when one would reasonably expect the residents to be awake. In addition, in both cases the police did not hear any noise from inside the apartments suggesting that they had been heard but were being refused admittance, and no exigent circumstances present.

Despite these similarities, in the *Chavez-Miranda* case the district court's denial of the suppression motion was affirmed. The Ninth Circuit distinguished *Chavez-Miranda* from *Banks* because there were at least three known occupants in the small apartment. The police also had

specific knowledge of the apartment layout and size. In *Banks*, the police did not know if anyone was home. Lastly, the court in *Chavez-Miranda* reasoned that "even if one of the three individuals inside the apartment was in the bathroom or otherwise indisposed, one of the others should have been available to respond." 306 F.3d at 981. This same distinction from the *Banks* case exists in both *Lucht* and *Chavez-Miranda*. *Chavez-Miranda* reveals that *Banks* has not created a "rigid rule" or fixed time on how much pause is a reasonable period under the totality of the circumstances.

The next case cited by the petitioner is *United States v. Spriggs*, 996 F.2d 320 (D.C. Cir. 1993) (See Pet. 13). In *Spriggs*, the DEA executed a search warrant at 7:45 a.m. on a weekday. The agents waited approximately 15 seconds between the knock-and-announcement before forcing the door open. The Court of Appeals for the District of Columbia noted that when the door was forced open, Spriggs and his wife were found coming out of the bedroom door some 25 to 35 feet away from the point of entry. *Spriggs*, 996 F.2d at 322. There is no mention of Mr. Spriggs being "indisposed" although he initially challenged the search on the basis of a single knock-and-announcement being unlikely to be heard in the morning. Again, there were two occupants in *Spriggs*, unlike *Banks*. In *Banks* there was uncontroverted evidence that he was in the shower when the knock-and-announcement occurred. The prosecution in *Banks*, argued, at the district court level, that the shower prevented him from hearing the knock-and-announcement. The District of Columbia Circuit could have well decided the *Banks* case in the same fashion as the Ninth Circuit given its recognition: "The time that section 3109 requires officers to wait before they may construe no response as a denial of admittance depends largely on the factual determinations made by the trial court." *Spriggs*, 996 F.2d at 322. The *Spriggs* court noted that in *Griffin v. United States*, 618 A.2d 114 (D.C. App. 1992), a 30 second delay was found insufficient under the knock-and-announcement requirement, because the search was conducted at 1:30 a.m. and it was unreasonable to think the occupants were awake and able to respond promptly.

The next case cited by petitioner is the Fifth Circuit Case, *United States v. Jones*, 133 F.3d 358 (5th Cir. 1998) (Pet. 14). In *Jones*, the police executed a search warrant after pausing 15-20 seconds after the knock-and-announcement. The facts recounted in the *Jones* case are scant to say the least. Mr. Jones argued that 15 to 20 seconds is not a reasonable period to expect an occupant to respond "a potentially unexpected announcement." While it is somewhat speculative, one would suspect that had Mr. Jones been the sole occupant and been indisposed for some reason, these facts should have merited mention. In *Jones*, the Fifth Circuit found a 15-20 second wait (under a common-law knock-and-announcement rule) sufficient time given the danger in drug cases of destruction of evidence. *Jones*, 133 F.3d at 361-362. The record is barren of any particularized facts justifying this fear. The *Jones* court did note: "It is possible that a delay in a particular case might be too short to imply refusal of admittance under section 3109, but would be reasonable for the Fourth Amendment . . ." *Jones* 133 F.3d at 361. The Fifth Circuit in *Jones* recognized that a time frame greater than 15-20 seconds might be necessary under Title 18 U.S.C. §3109, which is the provision applicable to analysis under the *Banks* case.

The next case cited by petitioner is *United States v. Garcia*, 983 F.2d 1160 (1st Cir. 1993) (Pet 14). In *Garcia*, police officers obtained a state search warrant after having a controlled buy. The officers went to the apartment and knocked and announced their presence. They waited ten seconds and after hearing no response made a forcible entry. When the officers burst through the door they saw the defendants and a woman holding a child in the front room watching television. *Garcia*, 983 F.2d at 1168. The court in *Garcia* focused primarily on the easily hidden or destroyable nature of the evidence as justifying the short pause. The facts in *Garcia* indicate that the officers were aware of the immediate presence of the occupants given that they were watching television just behind the closed door, and the failure to respond quickly gave rise to a reasonable inference of refusal. This was not specifically addressed in the court's analysis, it does however, provide justification for the short delay. Again, the facts specific to the *Banks*

case were not the facts before the *Garcia* court.

The petitioner cites the case of *United States v. Gatewood*, 60 F.3d 248 (6th Cir. 1995) to argue that the *Banks* decision conflicts with other circuit courts (Pet. 14). In *Gatewood*, the police officers executed a search warrant by knocking and announcing. A video tape of the incident revealed that the occupants unlocked the door and opened it after ten seconds. There was no forcible entry in the case. The *Gatewood* case is a knock and admittance case. The *Gatewood* court, despite the clear evidence of admittance, alternatively concluded had a forcible entry occurred, the delay was reasonable. 60 F.3d at 250-51. In contrasting *Gatewood* with *Banks*, had respondent actually answered the door, undoubtedly, there would have been a different result in the Ninth Circuit.

The petitioner refers to the case of *United States v. Markling*, 7 F.3d 1309 (7th Cir. 1993), as a case which is at odds with the *Banks* majority opinion (Pet. 14). In *Markling*, the police executed a search warrant on a motel room as part of a drug investigation. The police, prior to executing the search warrant, observed Mr. Markling return to his motel room about 5 p.m. Thereafter, two suspected drug buyers went to the motel room and after six minutes they departed. The two were stopped, searched and two bags of cocaine base were recovered from their persons. One of the drug buyers advised that Mr. Markling was "extremely paranoid" and would flush any other drugs in the room down the toilet if he became suspicious." *Markling*, 7 F.3d at 1312. At about 7 p.m. the police executed the search warrant through a knock-and-announcement at adjoining room door, waited seven seconds, hearing no response then made a forcible entry. They discovered Mr. Markling in a fetal position on the bathroom floor. Id. The obvious difference in facts between the *Banks* case and *Markling* is the particularized knowledge from the officers investigation that Mr. Markling was highly likely to destroy evidence. This case presents exigent circumstances which were not present in the *Banks* case. Obviously, most, if not all, motel rooms are significantly smaller than a two bedroom apartment. The officers heard no noise which might make the announcement difficult to hear. Under these different facts

the Seventh Circuit found that it was reasonable for the officers to conclude after a seven second lapse Mr. Markling "was not going to answer the door." *Markling*, 7 F.3d at 1318.

Petitioner next cites *United States v. Goodson*, 165 F.3d 610 (8th Cir. 1999) as another example of how *Banks* is at odds with other circuit courts (Pet. 14). The *Goodson* case involved the search of a one story ranch home. The police officers, executing a search warrant for drugs at 1:44 a.m., knocked twice and announced their presence (and presumably their purpose). *Goodson* 165 F.3d at 614. In *Goodson*, the officers were concerned for officer safety because the suspect had a violent criminal history for assault with a deadly weapon. The officer, after waiting 20 seconds for a response, forced entry because he feared for officer safety and was concerned about destruction of evidence. This case involves exigent circumstances. Here, the forcible entry after a 20 delay was upheld because there was a particularized concern for officer safety. In *Banks*, the officers had no known violent criminal history of the suspect which would give rise to reasonable suspicion that a greater risk to officer safety existed. These important facts are different between the two cases and account for the differing results under the totality of the circumstance's test.

The last case cited by the petitioner as indicative of the majority opinion in *Banks* as being out of conformity with other circuit courts is *United States v. Jenkins*, 175 F.3d 1208 (10th Cir. 1999). In *Jenkins*, the police obtained a search warrant as part of a narcotic's investigation. The search warrant was authorized to search the residence of the co-defendant Monika Payne, the girlfriend of Mr. Jenkins. Mr. Jenkins had a child with Ms. Payne and regularly resided at the house. Id. *Jenkins* involved a search executed at 10 a.m. In *Jenkins*, the police were aware that there were multiple occupants in the home. The surveillance established that although the residence was Ms. Payne's, Mr. Jenkins was regularly present. *Jenkins*, 175 F.3d at 1216. The total time between the initial knock-and-announce and the application of force on the inner door, was 14 to 20 seconds. *Jenkins*, 175 F.3d at 1211. When the officers entered the home they found Mr. Jenkins' girlfriend, Ms. Payne, near the front door. Mr. Jenkins and his daughter were

in a bedroom where they were laying on the bed. *Jenkins*, 175 F.3d at 1211. Mr. Jenkins contended the police department had a ten second wait policy before force would be applied after an announcement. *Jenkins*, 175 F.3d at 1212. The Tenth Circuit noted that the record below did establish that the Wichita police department trains its officers to wait ten seconds after knocking and announcing before forcibly entering a residence "which apparently does not vary according to the size of the premises to be searched." 175 F.3d at 1214. The Tenth Circuit noted "such an inflexible policy clearly would violate the knock-and-announce standard. c.f. *United States v. Ward*, 171 F.3d 188 (4th Cir. 1999) (stating that a purported sixty second FBI policy would be troublesome under section 3109 in light of rule that amount of time officers must wait varies with exigencies of each case). The *Jenkins* court expressed "grave concerns" over the rigid rule of the Wichita Police Department's "10 second" policy. *Jenkins*, 175 F.3d at 1214-15. The *Jenkins* court noted that "compliance with the knock-and-announce component of the Fourth Amendment reasonableness inquiry must be evaluated on a fact dependent, case by case basis." 175 F.3d at 1214. The *Jenkins* court noted in reviewing the relevant case law that "the prospect of utilizing these cases as guideposts is appealing, a bright line rule for determining how much time is enough is inappropriate." 175 F 3d at 1213. The *Jenkins* court sustained the forcible entry into the home after a wait of 14 to 20 seconds. It noted that the police knocked and announced twice. Further, the *Jenkins* court noted that the warrant was executed in the middle of the day when "'most people are awake and engaged in everyday activities.'" 175 F.3d at 1215 c.f. *United States v. Spikes*, 158 F.3d 913, at 927 (6th Cir. 1998). The distinguishing facts between *Banks* and *Jenkins*, are that the officers in *Jenkins* believed that there were multiple occupants at the residence where, as in *Banks*, the officers were aware of only one occupant, and did not know whether he was even home when the warrant was executed. Further, in the *Jenkins'* case, because of multiple occupants, it was unlikely that if one person was "indisposed" that the other occupants would be unable to respond in the 14 to 20 second time frame. Petitioner states: "While complete uniformity cannot be expected on such a fact sensitive

question as reasonableness of a delay before entry, the Ninth Circuit's approach is significantly out of step with that of other circuits." (Pet. 15). The Ninth Circuit's approach in *Banks* was the application of the totality of the circumstances test. *Banks*, in the majority opinion, concluded that under the unique facts of that case, it was unreasonable to infer a refusal in 15 to 20 seconds where the sole occupant was indisposed in the shower. Apparently, petitioner wants this Court to announce a rigid rule that 15 to 20 seconds constitutes sufficient time to infer a refusal under the knock-and-announcement statute. This would virtually eliminate the Court's supervisory role in a crucial area of the Fourth Amendment. The adoption of a rigid rule of 20 seconds would short circuit Fourth Amendment reasonableness inquiries. Petitioner states that it does not expect "complete uniformity" on a fact bound determination of reasonableness. Yet this is the main reason that petitioner argues review is warranted.

C. The Suppression of Evidence in *Banks*, Vindicates Fundamental Fourth Amendment Protection Against Invasions of Privacy.

The petitioner asserts that "even if the officers had waited longer, respondent still would not have heard them" and answered the door. (Pet. 15). The argument is essentially that the forcible entry would have inevitably been made anyway (albeit at a later point in time) so that there was "no harm and no foul." The petitioner then contends the sanction of suppression is in effect disproportional punishment on society's interest in effective law enforcement. (Pet. 15-17).

Petitioner cites *United States v. Espinosa*, 256 F.3d 718 at 725 (7th Cir. 2001) for the proposition that "the application of the exclusionary rule should be limited only to those instances where the constitutional violation has caused actual harm . . ." Respondent's Fourth Amendment privacy interests *were* harmed. He was confronted with armed strangers bursting into his home while he stumbled naked, wet and in fear for his life.

In *Miller v. United States*, 357 U.S. 301, 78 S.Ct. 1190, 2 L.Ed. 2d 1332 (1958), police officers went to Mr. Miller's home to arrest him for narcotics violations. The officers knocked and said "Police," but did not indicate they had an arrest warrant. Mr. Miller then tried to shut

the door and they forced entry. Inside, narcotics were seized incident to arrest. The one issue on appeal was the officer's failure to announce his purpose before entry pursuant to Title 18 U.S.C. §3109. In determining the failure to announce the officer's purpose prior to forcible entry was a violation of §3109, Justice Brennan, speaking for this Court stated:

> We are duly mindful of the reliance that society must place for achieving law and order upon the enforcing agencies of the criminal law. But insistence on observance by law officers of traditional fair procedural requirements is, from the long point of view, best calculated to contribute to that end. However, much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of shortcut methods in law enforcement impairs its enduring effectiveness. The requirement of prior notice of authority and purpose before forcing entry into a home is deeply rooted in our heritage and should not be given grudging application. Congress, codifying a tradition embedded in Anglo-American law, has declared in §3109 the reverence of the law for the individual's right of privacy in his house. Every householder, the good and the bad, the guilty and the innocent, is entitled to the protection designed to secure the common interest against unlawful invasion of the house.

Miller, 357 U.S. at 313. Although it will never be known for sure, had the officers in *Banks* paused just a bit longer, it might have afforded respondent the chance to have met the intruders with the small dignity of a towel. It is just this sort of privacy interest which is at the very core of the Fourth Amendment. Respondent denies petitioner's assertion that there was no causal relationship between the violation of the Fourth Amendment and his privacy interests. (See, Pet. 16).

D. The Fourth Amendment's Flexible Reasonableness Standard Precludes the Formulation of Bright Line Rules.

Petitioner complains that the *Banks* case "guidelines" are generalizations that "are insufficient to provide meaningful guidance to officers engaged in the dangerous business of executing search warrants." (Pet. 17). Contrary to this assertion, the majority opinion in *Banks* attempted to distill categories from case law, to serve as aids or analytical tools. *Banks*, 282 F.3d at 704. The *Banks* majority opinion provided an effort to explain from earlier cases, categories where anyone, including law enforcement, could better understand this area. The guidelines are not intended to replace the case by case analysis required under the Fourth Amendment

reasonableness standard. The petitioner would prefer "bright-line" rules as it urged this Court to adopt in *Richards v. Wisconsin*, 520 U.S. 385, 117 S.Ct. 1416, 137 L.Ed 2d 615 (1997). In *Richards*, this Court was asked to approve the Wisconsin Supreme Court's blanket exception to the knock-and-announce requirement whenever the case involved a felony drug investigation. Justice Stevens, speaking for a unanimous Court, rejected the notion that a blanket exception to the knock-and-announce requirement disappears whenever a felony drug investigation is present. In Wisconsin, the State Supreme Court determined that no specific information about dangerousness or the possible destruction of drugs was necessary to dispense with the knock-and-announce requirement. This Court was squarely presented with the issue of whether generalizations about today's drug culture"justifies dispensing with case-by-case evaluation of the manner in which a search was executed." *Richards*, 520 U.S. at 391-392. Justice Stevens noted: "If a *per se* exception were allowed for each category of criminal investigation that included a considerable-albeit hypothetical-risk of danger to the officers or destruction of evidence, the knock-and-announce element of the Fourth Amendment's reasonableness requirement would be meaningless." *Richards*, 520 U.S. at 394.

This Court in *Richards* recognized the dangers inherent in providing rigid rules or exceptions to the knock-and-announce requirement. Justice Stevens noted "the fact that felony drug investigations may frequently present circumstances warranting a no-knock entry cannot remove from the neutral scrutiny of a reviewing court the reasonableness of the police decision not to knock-and-announce in a particular case." *Id.* "Facts" under a reasonableness analysis may justify no knock in one case, facts in another case may make a pause of 15-20 seconds unreasonable. The complained of "guidelines" do not alter, amend or supplant the case by case totality of the circumstances analysis mandated by the Fourth Amendment. The uncertainty complained of by petitioner is really that which is inherent in the application of the law to the facts.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

DATED this January 23, 2003.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is a person of such age and discretion as to be competent to serve papers. That on January 23, 2003, she served a copy of the above and foregoing Brief by placing said copy in a postpaid envelope, addressed to the person(s) hereinafter named, at the address(es) stated below, which is/are the last known address(es), and by depositing said envelope and contents in the United States mail at Las Vegas, Nevada or by hand delivery.

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Helena Bozzo

Supreme Court, U.S.
FILED
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No. 02-473

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

LASHAWN LOWELL BANKS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

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REPLY BRIEF FOR THE UNITED STATES

Respondent has provided no persuasive reason for this Court to leave unreviewed the Ninth Circuit's unprecedented decision adopting a complex, four-part matrix for determining how long officers must wait, after knocking and announcing their presence and receiving no response, before they may enter a residence to execute a valid search warrant. Nor has respondent explained how the Ninth Circuit's decision in this case, which held that the officers' 15- to 20-second delay after knocking and announcing was unreasonable, can be reconciled with numerous decisions of other courts of appeals that, as the Ninth Circuit itself recently recognized, have upheld forcible entries under similar (or less compelling) circumstances.

Instead, respondent concedes that the officers went to his small apartment at 2 p.m. on a weekday to execute a valid search warrant for drugs, without knowing whether anyone was in the apartment at the time; "knocked loudly and announced 'Police, search warrant' in a loud authoritative tone"; did not hear any response; and waited at least 15-20 seconds before forcibly entering the apartment. Br. in Opp. 3. He also acknowledges that he was in the shower at the time and did not hear the officers knock and announce. *Ibid.* Under such circumstances, there can be no doubt that the officers acted reasonably and that the evidence they obtained during the search of the premises should not be suppressed. The Ninth Circuit's decision to the contrary is inconsistent with this Court's precedents, conflicts with numerous decisions of other courts of appeals, and creates significant uncertainty in a recurring aspect of police practice. This Court's review is therefore warranted.

A. The Court Of Appeals' Decision Is Inconsistent With This Court's Precedents

As explained in the petition for certiorari (Pet. 8-10), the Ninth Circuit's inflexible, complex, and confusing four-part categorical scheme is inconsistent with this Court's longstanding recognition that the Fourth Amendment does not "mandate a rigid rule of announcement," *Wilson* v. *Arkansas*, 514 U.S. 927, 934 (1995), and that the "general touchstone of reasonableness * * * governs the method of execution of the warrant." *United States* v. *Ramirez*, 523 U.S. 65, 71 (1998). The Ninth Circuit's categorical approach disregards the myriad factual circumstances and dangers confronting officers executing warrants, and in a variety of circumstances would reduce the knock-and-

announce requirement to a "senseless ceremony," *Wilson*, 514 U.S. at 936. It also improperly elevates certain factors, such as the destruction of property, which has little or no bearing on the reasonableness of the officers' entry, while ignoring or minimizing other, highly relevant factors, such as the real risk that respondent would try to destroy evidence (by, for example, flushing the drugs down the shower or toilet). See Pet. 9-10.

Respondent attempts to characterize the Ninth Circuit's categorical scheme as a simple application of the "totality of the circumstances" standard that has long been applicable to challenges to the execution of a search warrant. Br. in Opp. 4-5, 7-8. According to respondent, the court of appeals' four-part matrix "was merely an analytical distillation of cases" interpreting 18 U.S.C. 3109 and does not require "a different lapse of time" for each category it defines. Br. in Opp. 7, 4.

That reading of the opinion below is mistaken. By its terms, for example, the Ninth Circuit's formula would require that, absent exigent circumstances, officers must allow for "a lapse of a significant amount of time" before making a *non-forcible* entry. Where, however, that same entry would require *force*, and therefore some destruction of property, the officers must allow "an even more substantial amount of time" after knocking and announcing. Pet. App. 5a-6a.

Respondent also mistakenly asserts (Br. in Opp. 18) that the United States is seeking to frustrate the totality-of-the-circumstances test by advocating "a rigid rule that 15 to 20 seconds constitutes sufficient time to infer a refusal under the knock-and-announcement statute." To the contrary, the United States seeks this Court's review precisely because the Ninth Circuit's scheme *lacks* the flexibility vital to the proper

application of the totality-of-the-circumstances test, fails to take into account the full range of factual circumstances facing law enforcement officers, and places undue reliance on the destruction of property, which has little or no bearing on the reasonableness of the officers' entry. In any event, respondent cannot use the flexibility of the totality-of-the-circumstances analysis to justify the Ninth Circuit's plainly erroneous holding that a delay of 15-20 after knocking and announcing was unreasonable under the circumstances of this case.

By making the amount of time that officers must wait vary according to whether execution of a warrant requires property damage, the court of appeals' approach is also plainly at odds with this Court's holding in *Ramirez* that the reasonableness of a no-knock entry "depends in no way on whether police must destroy property in order to enter." 523 U.S. at 71. It is no answer to argue, as respondent does (Br. in Opp. 8-11), that *Ramirez* involved a no-knock entry and therefore has no bearing on the relevance of property damage to the reasonableness of an entry where the officers have knocked and announced their presence. *Ramirez* reflects a general principle that the need to damage property to effectuate an entry to execute a search warrant should not be part of the analysis of determining whether the entry itself was reasonable and whether evidence should be suppressed. Instead, the proper inquiries are whether admittance has been effectively refused and whether other law enforcement needs render prompt entry reasonable. See Pet. 11-12. The Ninth Circuit's decision below engrafts a rigid property-destruction limitation onto the knock-and-announce requirement of the Fourth Amendment and 18 U.S.C. 3109, and it does so without even citing

Ramirez. That aspect of the decision below, standing alone, warrants this Court's review.

B. The Decision Below Conflicts With Decisions Of Other Courts Of Appeals

Respondent's attempt to reconcile the Ninth Circuit's holding in this case with those of other courts of appeals, which have upheld forcible entries involving comparable timing in similar factual circumstances, is unavailing. As respondent concedes, the officers in this case were executing a valid warrant for drugs during the middle of the afternoon at an apartment they knew to be quite small and had probable cause to believe contained readily disposable drugs that respondent was selling from the premises. They knocked loudly and announced their purpose and waited at least 15-20 seconds before forcibly entering respondent's apartment. Br. in Opp. 2-3; Pet. App. 14a. As the cases discussed in the petition for certiorari demonstrate (Pet. 12-15), it is beyond dispute that the entry in this case would have been upheld in many other circuits.

Indeed, the Ninth Circuit itself has candidly acknowledged that its decision in this case cannot be reconciled with either the Ninth Circuit's own prior decisions or the decisions of other courts of appeals, all of which have upheld the constitutionality of forcible entries where the officers waited 10 to 20 seconds after knocking and announcing. *United States* v. *Chavez-Miranda*, 306 F.3d 973, 981-982 n.7 (2002) ("*Banks* appears to be a departure from our prior decisions. As noted by the trial court, we have found a 10 to 20 second wait to be reasonable in similar circumstances, albeit when the police heard sounds after the knock and announcement. * * * Several other circuits have upheld similar waits even without noise being heard."),

petition for cert. pending, No. 02-8332 (filed Dec. 30, 2002). Specifically, the Ninth Circuit in *Chavez-Miranda* noted that its decision in this case conflicted, *inter alia*, with the First Circuit's decision in *United States* v. *Garcia*, 983 F.2d 1160, 1168 (1993), the Fifth Circuit's decision in *United States* v. *Jones*, 133 F.3d 358, 361-362, cert. denied, 523 U.S. 1144 (1998), the Eighth Circuit's decision in *United States* v. *Lucht*, 18 F.3d 541, 548, 549, cert. denied, 513 U.S. 949 (1994), and the D.C. Circuit's decision in *United States* v. *Spriggs*, 996 F.2d 320, 323, cert. denied, 510 U.S. 938 (1993), all of which were discussed in the petition for certiorari (Pet. 12-14. See *Chavez-Miranda*, 306 F.3d at 981-982 n.7. The Ninth Circuit nonetheless denied the government's petition for rehearing en banc in this case. Pet. App. 33a-34a.

Respondent's attempts to explain away these conflicting cases on their facts are unpersuasive. Frequently, for example, respondent relies on facts, such as the number of occupants and whether any occupant was in the shower or was otherwise "indisposed," that were unknown to the officers at the time they decided to forcibly enter the residence. See Br. in Opp. 12-14. In any event, as the Ninth Circuit itself has acknowledged, the reasoning of the other circuits' cases leaves no doubt that those circuits would have upheld the entry in this case as reasonable. See Pet. 12-15.

C. The Court Of Appeals Improperly Suppressed Evidence

Respondent's attempt to defend the Ninth Circuit's application of the exclusionary rule under the circumstances of this case is equally unpersuasive. As the dissent below emphasized (Pet. App. 14a), it is clear under the facts of this case that the events would not

have unfolded any differently had the officers waited longer before entering. Respondent does not dispute that he was showering when the officers knocked at his door and therefore did not hear them knock and announce. Accordingly, even if the officers had waited longer or knocked again before entering, respondent still would not have heard them and so still would not have admitted them to execute the warrant. Because the officers would thus have forcibly entered respondent's apartment and obtained the same evidence under the warrant-authorized search regardless of the violation found by the court of appeals, that supposed violation did not in any way harm respondent's property or privacy interests. As this Court explained in *Nix* v. *Williams*, 467 U.S. 431, 443 (1984), "the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse*, position that they would have been in if no police error or misconduct had occurred." See *Segura* v. *United States*, 468 U.S. 796, 814 (1984); Pet. 15-17; see also *United States* v. *Langford*, No. 02-1167, 2002 WL 31890721, at *2-*3 (7th Cir. Dec. 31, 2002) (314 F.3d 892) (holding that the violation of the knock-and-announce rule in executing a valid search warrant "does not authorize exclusion of evidence seized pursuant to the ensuing search," and citing the Ninth Circuit's opinion in this case as a conflicting decision).

D. The Court of Appeals' Decision Creates Significant Uncertainty

The petition demonstrated (Pet. 17-18) that the Ninth Circuit's complex, four-part categorical scheme threatens to complicate and confuse the procedures for

executing search warrants and to impose unnecessary and unacceptable risks on law enforcement personnel charged with applying it. Respondent has not shown otherwise. Officers engaged in front-line law enforcement activity often must make difficult, on-the-spot judgments under unclear and dangerous circumstances. Under the Ninth Circuit's scheme, those officers must now pause to make complicated calculations of how much property will likely be destroyed to effect an entry, and how specific are certain exigencies that prompt the entry. Even then, the Ninth Circuit's scheme provides officers no guidance about how much longer they must wait in a case such as this.

* * * * *

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

FEBRUARY 2003

(3)

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2002
No. 02-473

UNITED STATES OF AMERICA
Petitioner,

vs.

LASHAWN LOWELL BANKS
Respondent.

ON WRIT OF CERTIORARI
TO THE NINTH CIRCUIT COURT OF APPEALS

BRIEF OF WAYNE COUNTY, MICHIGAN AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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STATEMENT OF THE QUESTION

I.

May law-enforcement officers executing a search warrant for narcotics conclude, consistent with both statute and the Fourth Amendment, that they have been denied entry after waiting for 15-20 seconds after knocking and announcing, and if not, does the Fourth Amendment require the exclusion of evidence obtained under a valid search warrant, and during a search of proper scope, because of a violation of principles of announcement?

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Interest of the Amicus

Amicus is the County of Wayne, Michigan. Wayne County is the largest County in the State of Michigan, and the criminal division of Wayne County Circuit Court is among the largest and busiest in the entire United States. The Wayne County Prosecuting Attorney, charged by state statutes and the State Constitution with responsibility for litigating all criminal prosecutions within his jurisdiction, has a vital interest in the outcome of the current litigation, as it may well affect the execution of his constitutional and statutory duties.

As the legal representative of a unit of state government, Supreme Court Rule 37 permits *Amicus* to file a supporting brief without permission of the parties.

Statement of Material Facts and Proceedings

Amicus concurs with the statement by the Government as Petitioner.

Argument

A. Introduction

The United States argues in this case that principles of knock and announce as embodied both in statute and the Fourth Amendment were not violated in this case. Amicus joins fully in that argument. But even if the 9th Circuit correctly resolved that question, there remains the question of whether an exclusionary sanction should be applied to the violation, a question reserved by this Court in *Wilson* v *Arkansas*, 514 US 927, 936, 115 S Ct 1914, 131 L Ed 2d 976 (1995). Further, federal circuits are split on the question, the 6th Circuit holding that an exclusionary sanction must be applied, see *United States v Dice*, 200 F3d 978 (CA 6, 2000), and the 7th Circuit holding that application of an exclusionary sanction is inappropriate, see *United States v Langford*, 314 F3d 892 (CA 7, 2002). State supreme courts are also in disagreement, the Michigan Supreme Court holding that exclusion is inappropriate, *People v Stevens*, 460 Mich 626 (1999), and the Arkansas Supreme Court reaching the contrary conclusion, *Mazepink v State*, 987 SW2d 648 (1999). Should this Court conclude that the entry here was improper, the admissibility of the evidence cannot be resolved without addressing this question. If necessary, amicus suggests that direction for briefing on the question would not be inappropriate.

B. The Exclusionary Rule: Its Purpose and Limits

(1) Purpose

The purpose of the exclusionary rule is to deter improper police conduct by denying the Government the *fruit* of that conduct; this principle is well-established, and Amicus thus will not labor long to demonstrate it. While the Fourth Amendment itself has roots in such cases as *Wilkes* v *Wood*, 19 Howell's State Trials 1153 (1763), *Entick* v *Carrington*, 19 Howell's State Trials 1029 (1765) (upholding a verdict for

trespass against the officers executing a general warrant), and *Semayne's Case*, 77 Eng Rep 194, 195 (1603) (specifically concerning forcible entries into dwellings, and stating that "in all cases when the King is party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K(ing)'s process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors...."), none of these cases resulted in the exclusion of evidence from a criminal proceeding, being rather, for the most part, civil cases to recover damages. Not until almost 100 years after the adoption of the Fourth Amendment did the notion of exclusion of evidence for its violation appear in our jurisprudence, in the case of *Boyd* v *United States*, 116 US 616, 6 S Ct 524, 29 L Ed 746 (1886). Indeed, the contrary of the proposition that evidence should be excluded from trial based on the manner of its acquisition was well-established by the time of the *Boyd* decision. In 1 Greenleaf, *A Treatise on the Law of Evidence* (14th ed, 1884), § 254a, p.325-326 the author listed among those doctrines of evidence which were "common to all the United States" that:

> ...though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility if they are pertinent to the issue. The court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it form an issue to determine the question.

See also *United States* v *La Jeune*, 26 F Case 832, 842 (CCD Mass 1822) (No 15,551), where Justice Story, sitting as circuit justice, rejected an argument that evidence should not be admitted because unlawfully seized, remarking that "...the law deliberates not on the mode, by which (evidence) has come to the possession of the party, but on its value in

establishing itself as satisfactory proof." This opinion, along with that of Justice Wilde of the Supreme Judicial Court of Massachusetts in *Commonwealth* v *Dana*, 43 Mass 329, 337 (1841) that

> (i)f the search warrant were illegal, or if the officer serving the warrant exceeded his authority, the party on whose complaint the warrant issued, or the officer, would be responsible for the wrong done; but this is no good reason for excluding the papers as evidence, if they were pertinent to the issue....the court can take no notice how they were obtained, whether lawfully or unlawfully; nor would they form a collateral issue to determine that question,

were "invoked as authority for like decisions in other state courts" and "relied on by federal courts to justify the admission of books and papers into evidence, regardless of the legality of their seizure." Bradford P. Wilson, "The Fourth Amendment as More Than a Form of Words: The View from the Founding," in Hickok, editor, *The Bill of Rights* (University Press of Virginia, 1991), p.151, 169. Case reports from almost the first 100 years of the existence of the Fourth Amendment reveal a number of actions alleging a wrongful search or seizure, with "traditional common-law forms of action associated with trespass...without exception, the modes of redress invoked." Wilson, at 165. The Fourth Amendment was not ignored; rather, "the requirements of due process and of nonarbitrary searches and seizures lived in harmony in the thought of the Founders. In that same jurisprudence, however, the exclusionary rule has no life at all." Wilson, at 169. And then came *Boyd* (regarding which Wigmore remarked that the doctrine that evidence could not be excluded because of the manner of its acquisition "was never doubted until the appearance of the ill-starred majority

opinion of *Boyd v United States*...." 4 Wigmore, *Evidence* (2d Ed: 1923) § 2184, p.632).

Boyd is of historical interest as the progenitor of the exclusionary rule, but its rationale has been discredited, and it thus does not illuminate the purpose of the exclusionary rule as currently understood. The majority in *Boyd* relied heavily on the *Fifth* Amendment to invalidate an order that Boyd produce an invoice to show the quantity and value of goods alleged to have been illegally imported at a hearing on the forfeiture of those goods, a rationale not followed today. Indeed, 18 years later the Supreme Court in *Adams* v *New York*, 192 US 585, 24 S Ct 372, 48 L Ed 575 (1904) rejected a challenge to evidence seized pursuant to a search warrant by simply declaring that courts will not inquire into the means by which evidence otherwise admissible was acquired, distinguishing *Boyd* on its Fifth Amendment rationale by limiting it to situations where a "positive act" of production on the part of the defendant was required.

It was *Weeks* v *United States*, 232 US 383, 34 S Ct 341, 58 L Ed 504 (1914) which first held that evidence may be excluded on the ground of the method of its seizure, established in the context not of a motion to suppress in the criminal case, but a motion for return of property before trial on the ground that the government had no right to possess it, with the same resulted reached–the loss of the ability of the government to offer the items as evidence at the criminal trial. Here the rationale for exclusion had no Fifth Amendment basis; rather, said the Court, "The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures...should find no sanction in the judgment of the courts....To sanction(an unlawful invasion of the dwelling) would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution...." In short, the evidence was excluded to prevent the Government from obtaining an *advantage* through a violation of the Constitution.

Of course, it was *Mapp* v *Ohio*, 367 US 643, 81 S Ct 1684, 6 L Ed 2d 1081) which applied the rule of *Weeks* to the States by finding the Fourth Amendment "incorporated" by the Fourteenth Amendment, and the exclusion of evidence gained from its violation necessary as a "deterrent safeguard without insistence upon which the Fourth Amendment would" be reduced to a "form of words," the Court also quoting approvingly from *Elkins* v *United States*, 364 US 206, 80 S Ct 1437, 4 L Ed 2d 1669 (1960) that "The rule is calculated to prevent not to repair. Its purpose is to deter...by removing the incentive to disregard it."

It is now clear beyond dispute that the exclusionary rule is *not* "part and parcel" with the Fourth Amendment, rather the rule is "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *United States* v *Calandra*, 414 US 338, 94 S Ct 613, 38 L Ed 2d 561 (1974). See also *Stone* v *Powell*, 428 US 465, 96 S Ct 3037, 49 L Ed 2d 1067 (1976); *United States* v *Leon*, 468 US 1032, 104 S Ct 3479, 82 L Ed 2d 778 (1984). Most recently the Court in *Pennsylvania Board of Parole* v *Scott*, 524 US 357, 118 S Ct 2014,141 L Ed 2d 344 (1998) held that the exclusionary rule is not to be applied at parole violation hearings, the Court observing in its analysis that the admission of illegally seized evidence does not violate the Constitution; the Fourth Amendment is violated when the illegal search occurs. The exclusionary rule is instead a judicially created means of deterring illegal searches and seizures, which has societal costs, meaning that it is not to be applied unthinkingly. Indeed, Chief Justice Warren remarked in *Terry* v *Ohio*, 392 US 1, 13-15; 88 S Ct 1868; 20 L Ed 2d 889 (1968) that:

> The exclusionary rule has its limitations as a tool of judicial control....[In] some contexts the rule is ineffective as a deterrent....Proper adjudication of cases in which the

> exclusionary rule is invoked demands a constant awareness of these limitations....[A] rigid and unthinking application of the...rule...may exact a high toll in human injury and frustration of efforts to prevent crime.

The purpose of the rule, then, is not to repair, but to deter. It carries with it a high societal cost in damaging the trial as a search for truth by excluding reliable and probative evidence, and is thus not to be applied "unthinkingly." As one commentator has well put it, "Granted that so many criminals must go free to deter the constable from blundering, pursuance of this police of liberation beyond the confines of necessity inflicts gratuitous harm on the public interest." Amsterdam, "Search and Seizure and Section 2255: A Comment," 420 Pa L Rev 378, 388-389 (1964). What is a "thinking" application of the rule which at least attempts in some measure to avoid the infliction of gratuitous harm on the public? What are its current limits?

(2) <u>Limitations on the Exclusionary Rule</u>

That "but for" causation is a *necessary* ***but not sufficient*** element of a claim that evidence should be excluded as a result of a constitutional violation by the police is readily apparent from exclusionary rule jurisprudence. As Professor LaFave has said, "in the simplest of Fourth Amendment exclusionary rule cases, the challenged evidence is quite clearly 'direct' or 'primary' in its relationship to the prior arrest or search, so that if it is determined that a Fourth Amendment violation has occurred it is apparent that the consequence must be suppression of that evidence in the trial of a defendant who has standing to object to the violation." 5 LaFave, *Search and Seizure* (3rd Ed.), §11.4, p. 231-232. But the exclusionary rule is not applicable in *all* cases where the evidence at issue would not have been discovered "but for" the improper conduct of the police, despite its deterrent

effect in these situations. In some situations, *despite* "but for" causation the rule is not applied because its cost is too high when weighed against its benefits.

(a) Standing

The initial restriction on the application of the exclusionary rule in situations where police error or misconduct is the "but for" cause of the discovery of the evidence to be offered at trial is that of "standing." The Fourth Amendment protection is personal, and though excluding evidence where the Fourth Amendment rights of the individual against whom the evidence is offered were not offended might nonetheless carry with it some deterrent effect, it has long been recognized that the "need for deterrence and hence the rationale for excluding the evidence are strongest where the Government's unlawful conduct would result in imposition of a criminal sanction on the victim of the search." *Calandra*, supra. The accused simply will not be heard to complain unless it is his or her Fourth Amendment rights that were compromised by the police.

(b) Fruit of the Poisonous Tree and Purged Taint

Though *Nardone* v *United States*, 308 US 338, 60 S Ct 266, 84 L Ed 307 (1939) is the first case to speak of the causal connection between improper governmental conduct and the evidence allegedly its fruit being so "attenuated" as to "dissipate the taint" of the wrongdoing and allow admission of the evidence, the doctrine came to full flower in *Wong Sun* v *United States*, 371 US 471, 83 S Ct 407, 9 L Ed 2d 441 (1963). Essentially, an informant who was a "first time" informant with no record of reliability, told federal agents that he had purchased heroin the night before from an individual known to him only as "Blackie Toy," who was the proprietor of a laundry on a particular thirty block street. The agents went to the laundry without an arrest or search warrant, and when Toy answered the door an agent said he had come for

his laundry. When Toy began to close the door, the agent identified himself, and Toy slammed the door and ran. The agents broke open the door and arrested Toy in his bedroom, and he gave information leading to another person, who gave up tubes of heroin. Toy also led the agents to the living quarters of Wong Sun, who was arrested and ultimately made incriminating statements. Before the Supreme Court were the admissibility of Toy's admissions in his bedroom, the admissibility of the heroin turned over by the third party who was discovered through Toy's admissions, the admissibility of Wong Sun's confession which was made several days after his arrest and release on recognizance; and the admissibility of the heroin turned over by the third party against Wong Sun.

The majority found that the agents lacked probable cause for the arrest of Toy, arising either from the information given them by the informant, or in combination with Toy's response to their presence at the laundry. Because the arrest without probable cause was unlawful, so was the entry to achieve it. The statements of Toy were excludable as the fruit of the illegal arrest, held the Court, as under the circumstances they were not the result of an intervening act of free will. The statements led the agents to a third party, Yee, who turned over heroin, and it was clear that the heroin would not have been obtained from Yee absent Toy's statements. The Court stated that the test for exclusion is *not* whether but for the illegal conduct it would not have come to light, but whether, "granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality...." *Wong Sun*, at 455. The heroin turned over by Yee met that test, and was thus inadmissible. Wong Sun's arrest was also held to be without probable cause by the lower court, but the Court found no reason to address that question, because "no evidentiary consequences" turned upon it. Wong Sun's confession was not the fruit of his arrest, in that he gave it voluntarily several days after he had been arraigned and released on his own recognizance. The Court thus found that the "connection

between the arrest and the statement had 'become so attenuated as to dissipate the taint,'" though clearly in a "but for" sense it was the fruit of the illegal arrest. Plainly, then, the Court rejected the "but for" test. Though the heroin surrendered by Yee was inadmissible against Toy because the result of Toy's improperly gained statements, this result did not obtain with respect to Wong Sun, as he had no standing to claim it.

Wong Sun teaches that evidence which is discovered as the result of improper police conduct is not necessarily excludable, for the exclusionary rule is not to be applied on a strict "but for" or "cause and effect" basis. The "fruit of the poisonous tree" must be excluded–there must be a "but for" causation demonstrated--but it is not true that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police, the question instead being in each case whether the evidence gained was "come at by *exploitation of the primary illegality*." Where the causal connection is attenuated, or the "taint" somehow "purged," exclusion will not result.

Two other cases well make this point. *Johnson* v *Louisiana*. 406 US 356, 32 L Ed 2d 152, 92 S Ct 1620 (1972) is a similar case on this point. The defendant claimed that his arrest in the nighttime without warrant was invalid absent some showing of exigent circumstances. The Supreme Court, however, declined to discuss whether the arrest was illegal, because even assuming that it was no exclusionary remedy would result. The defendant sought to have his lineup identification excluded as a fruit of the arrest. But the Court found that the lineup identification was not a fruit of the arrest under *Wong Sun*. Certainly "but for" the arrest the lineup would not have occurred; however, prior to the lineup (at which the defendant was represented by counsel) he was *arraigned*, and bail set. At the time of the lineup, then, his custody was not pursuant to the arrest, but to the commitment of the arraigning magistrate. Under these circumstances, held

the Court, it could not be said that the lineup was the result of "exploitation" of the challenged arrest, but rather resulted from "means sufficiently distinguishable to be purged of the primary taint."

Though "but for" causation existed, exclusion as a sanction was also held not required in *United States* v *Ceccolini*, 435 US 268, 55 L Ed 2d 268, 98 S Ct 1054 (1978). A police officer was taking a break in the defendant's flower shop, and while engaging in idle conversation with a shop employee noticed an envelope with money protruding from it lying on the cash register. The officer looked into the envelope and discovered that it contained not only money but also betting slips. The officer replaced the envelope and asked the employee, who had not seen these actions, to whom the envelope belonged. She told him it belonged to the defendant, resulting in his subpoena before a grand jury, where he committed perjury. The flower shop employee testified at the trial, and the question was whether the testimony of the employee was the poison fruit of the search of the envelope by the officer.

Certainly, "but for" the officer's improper conduct he would never have asked his question of the employee, and she would never have become a witness. The Court reiterated that "the question of causal connection in this setting, as in so many other questions with which the law concerns itself, is not be determined solely through the sort of analysis which would be applicable in the physical sciences. The issue cannot be decided on the basis of causation in the logical sense alone...." *Ceccolini*, at 276. The Court found that the evidence was overwhelming that the witness testified of her own free will, in no way coerced or induced by official authority as a result of the discovery of the betting slips.

(c) <u>Inevitable Discovery</u>

Nix v *Williams*, 467 US 431, 81 L Ed 2d 377, 104 S Ct 2501 (1984) is a further example of circumstances where though evidence may be discovered as a result of improper police conduct, it will nonetheless not be excluded in order to deter that conduct. The case delineates the nature and scope of the doctrine of "inevitable discovery."

A ten year old girl disappeared from a YMCA building where she had gone with her parents to watch an athletic contest. A warrant was issued for the defendant's arrest, and a large-scale search for the girl undertaken. There was evidence that she had been left somewhere between Des Moines, the place from which she was taken, and a highway rest stop where some of her clothing was found, and it was this area which was being searched by a small army of police and volunteers. In the meantime the defendant surrendered, and ultimately led the police to the body. His confession was found to have been improperly taken in the opinion from the United States Supreme Court commonly known as the "good Christian burial speech" case of *Brewer* v *Williams*, 430 US 387, 51 L Ed 2d 424, 97 S Ct 1232 (1977). The Court left open whether the body of the girl itself was the fruit of the improperly gained confession, so that the discovery of the body and any evidence gained from its discovery would be inadmissible, the Court expressly noting that this evidence "might well be admissible on the theory that the body would have been discovered in any event...."

On the retrial of Williams evidence from the discovery of the girl's body was admitted, though defendant's confession, and the fact that he had led the police to the body, were not. The state trial judge concluded that the state had proven by a preponderance of the evidence that the search team would have discovered the body within a short time even if Williams had not led the police it. However, on habeas corpus the Eighth Circuit held that inevitable

discovery did not apply because it was necessary to demonstrate not only that the evidence would inevitably have been discovered, but also that the constitutional error itself was committed in good faith. *Williams* v *Nix*, 700 F2d 1164 (CA 8, 1983). The Supreme Court disagreed with this formulation of the test.

The Court agreed that there is an exception to the exclusionary rule for evidence which would inevitably have been discovered; while, consistent with the deterrent purpose of the exclusionary rule, the police may not place themselves in a *better* position through impermissible conduct, there is no reason, held the Court, to put the police and prosecution in a *worse* position than they would have been *had the constitutional violation never occurred*. The good faith or bad faith of the police in the conduct found to be improper is thus irrelevant, for the deterrence rationale is served by placing the police in the *same position they would have been in if no error or misconduct had occurred at all*. *Nix*, at 387. Where the evidence would inevitably have been discovered the evidence is simply considered not the fruit of the illegality--there is no *exploitation* of the illegality, in *Wong Sun* terms--and hence the illegality cannot cause its exclusion. The Court found that the burden of proof on the prosecution to show that the evidence would inevitably have been discovered is the standard of preponderance of the evidence.

(d) <u>Independent Source</u>

Closely related to the fruit of the poisonous tree doctrine is the *independent source* doctrine-- where there is improper police conduct, which leads to the discovery of evidence in a "but for" sense, but the same evidence is come at by an *independent* lawful method, there is no reason to exclude it. This is distinguishable from inevitable discovery in that inevitable discovery does not posit an *actual* independent recovery of the evidence, but a *hypothetical* one, which the prosecution must demonstrate *would* have occurred

absent the illegality. With the independent source doctrine the evidence is actually obtained by a method independent of the improper one.

Illustrative of the doctrine is *Segura* v *United States*, 468 US 796, 82 L Ed 2d 599, 104 S Ct 3380 (1984). The defendant was arrested on probable cause in the lobby of his apartment building, and taken to his apartment unit by the police. When his codefendant opened the door the police entered without permission, and during a limited security check of the apartment observed drug paraphernalia. Two agents remained in the apartment while a search warrant was obtained, which for some reason took almost 19 hours. The warrant was executed and three pounds of cocaine, as well as other evidence, was found. The warrant affidavit showed probable cause, and it was based entirely on evidence independent of the observations made during the improper entry into the apartment. In other words, had that entry *never occurred*, the warrant would still have been issued and the search would have taken place, as the warrant affidavit did not rely in any way on the observations in the apartment. The United States Supreme Court held that the properly executed search pursuant to a warrant which was not gained through information obtained in the unlawful entry was an independent source for the discovery of the evidence found in the apartment.

Murray v *United States*, 487 US 533, 101 L Ed 2d 472, 108 S Ct 2529 (1988) is a "followup" case to *Segura*. There federal agents believed that narcotics were being stored in a warehouse, and made an illegal entry into the warehouse, discovering wrapped bales which they suspected contained marijuana. The premises were kept under surveillance while a warrant was obtained based upon probable cause wholly independent of the improper entry into the warehouse. The warrant was executed and the bales seized.

The Supreme Court found the case governed by *Segura* and the purposes of the exclusionary rule. The defendant attempted to limit the independent source doctrine by arguing that it applies only to evidence which had not been discovered at all during an improper search, but as to that which had been discovered, suppression was required even if the evidence was later discovered validly through a wholly independent method. The Court found the defendant's description of the independent source doctrine inconsistent with prior cases, and unsound as a matter of policy. Prior cases, including *Segura*, had applied the independent source doctrine to all evidence discovered pursuant to an independent source, whether previously also discovered improperly or not. Indeed, Justice Holmes had applied the doctrine to an untainted search which acquired evidence *"identical to the evidence unlawfully acquired."* See *Silverthorne Lumber* v *United States*, 251 US 385, 64 L Ed 2d 319, 40 S Ct 182 (1920). The basis of the independent source doctrine, much like that of the inevitable discovery doctrine, is that "The interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police *in the same*, not a *worse*, position than they would have been in if no police error or misconduct had occurred." *Murray*, quoting from *Nix v Williams* (initial emphasis added; second emphasis in the original).

(e) Noncriminal Proceedings

Finally, certain proceedings which are not criminal are not subject to the exclusionary rule. As already mentioned, the United States Supreme Court has only this past term held that the exclusionary rule does not apply to parole revocation proceedings. The exclusionary rule is a judicially created means of deterring illegal searches and seizures which exacts a high cost upon truth-seeking and law enforcement objectives. Particularly because parole is a variation of imprisonment, in itself a restraint on liberty, the State has an

overwhelming interest in compliance with terms of parole which is hampered by application of the exclusionary rule. Moreover, parole proceedings are administrative and informal, a process which would be altered by application of the exclusionary rule, requiring what in some cases might be extensive litigation on a collateral matter. The deterrence benefits of the rule simply, said the Court, do not outweigh its costs in this context. *Pennsylvania Board of Parole* v *Scott*, supra. Thus, though the evidence may be a "but for" result of improper police conduct, it will not be excluded in such a proceeding.

(3) Conclusion

The purpose of the exclusionary rule is to deter unlawful police conduct by preventing the Government from obtaining any *advantage* from that conduct. This end is accomplished by depriving the Government of the *fruits* improper conduct. Where evidence is discovered which is a "direct" or "primary" result from improper police conduct–a direct effect from a cause–then the evidence will be excluded. The rule of exclusion is not absolute, however, for even where the evidence sought to be admitted is the result of the improper conduct in that but for that conduct it would not have been discovered, the evidence will nonetheless be admissible if 1)the defendant is without standing to complain because it was not his or her right which was violated by the improper police conduct; or 2)if the causal connection between the improper conduct and the discovery of the evidence is so attenuated that it can be said that the "taint" of the improper conduct is dissipated, or, put another way, it can be said that the evidence was not obtained by police "exploitation" of the "primary illegality;" or 3)the Government can demonstrate by a preponderance of the evidence that had the improper conduct which uncovered the evidence not occurred that evidence would have been discovered by lawful means; or 4)the same evidence which was uncovered by the improper conduct is also obtained

through a proper independent source; or 5)the proceeding is not one to which the exclusionary rule is to be applied.

In fine, "but for" causation is a necessary but not sufficient element of a claim that evidence should be excluded as a result of a constitutional violation by the Government; the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police ***in the same, not a worse****, position than they would have been in if no police error or misconduct had occurred.*

C. Knock and Announce and Exclusion of Evidence: The Law Before Wilson v Arkansas

The exclusion of evidence as a sanction for violation of knock and announce principles where the search has otherwise been proper in all respects–the warrant demonstrates probable cause, and the search is one of proper scope and intensity–has slipped into the law almost by stealth. Its origins show no principled analysis of its application to a situation where causality is *entirely* absent; that is, where that which has been seized and is to be offered into evidence cannot be said in *any* principled sense to be the "fruit" of the improper governmental conduct, where in no other circumstance is the drastic sanction of exclusion ordered without a demonstration that *at least* there is a "but/for" causal relationship between the improper conduct and the discovery of the evidence. *Miller* v *United States*, 357 US 301, 2 L Ed 2d 1332, 78 S Ct 1190 (1958) is the oft-cited progenitor of the doctrine of exclusion in this situation, and it is thus with *Miller* that analysis should begin.

One Clifford Reed was arrested on a Washington, D.C. street pursuant to an arrest warrant, and told a federal narcotics agent that he had purchased heroin from Miller through an intermediary named Shepherd. Reed was to make another purchase from Shepherd that morning. An

undercover officer accompanied Reed, and Shepherd agreed to obtain heroin and deliver it to the agent. Shepherd went by cab to Miller's apartment, to which he was followed by authorities. Ultimately the agents went to Miller's apartment and knocked on the door. When Miller asked who was there they responded it was the police. Miller opened the door only partially, with an attached door chain barring the door, and the police then forced their way inside when he began to close the door, ripping the chain off. Their purpose was to arrest Miller, and they had no warrant to arrest, and had not expressly demanded admission or stated the reason for their presence. Marked money that had been given to Reed to purchase the heroin was found in a search of the apartment; none of it was found on Miller's person. The principal issue before the Supreme Court was Miller's arrest was unlawful not because of a lack of probable cause, but because of the manner of entry to achieve the arrest.

Justice Brennan writing for the court observed that the common law had historically limited the authority of law enforcement officers to break the door of a house to effect an arrest, except that authority existed allowing forcible entry to effectuate a *felony* arrest. What was unclear at the common law was whether a forcible entry to arrest for a felony required the existence of an arrest warrant. But in any circumstance, said the Court, the forcible entry was unlawful unless the officer first stated his authority and purpose for demanding admission, unless some exception existed under the circumstances. See 2 L Ed 2d at 1337-1338. In the case before it, the Court found that this requirement had not been met, rendering the arrest "unlawful" and the evidence, which again was not found on the person of Miller, inadmissible. It must be noted that the Court was not purporting to discover and announce a constitutional principle; rather, its ruling was premised on the law of the District of Columbia, which was conceded by all parties to be identical to 18 USC §3109, which concerns on its face, however, only the execution of search warrants.

A decade later the Court considered a similar question in *Sabbath* v *United States*, 391 US 585, 20 L Ed 2d 828, 88 S Ct 1755 (1968). Again the case involved a drug transaction, where one William Jones was caught by customs agents in possession of cocaine, which he said he was to transport to a person named "Johnny" in Los Angeles. A number in his possession was called, and Jones addressed the man answering as "Johnny" and said he had "his thing" and would bring it to his apartment. Equipped with a listening device, Jones made the delivery. Before he left the apartment, the agents went to the apartment door, knocked, and, receiving no response, opened the unlocked door and proceeded inside. Sabbath was arrested and the cocaine found under a couch cushion, from which Sabbath was seen withdrawing his hand as the agents entered. Though 18 USC §3109 only concerns entries to execute search warrants, the Court again stated that entries to arrest "must be tested by criteria identical to those embodied in" the statute, so that "we must look to § 3109 as controlling." 20 L Ed 2d at 833. The Court rejected the argument that opening an unlocked door does not constitute a violation of the statute, holding essentially that the statute prohibits "unannounced intrusions" into a dwelling for the purpose of arrest or search. The drugs found were thus suppressed, the Court this time not stating that the arrest of Sabbath was improper, but that the "agents' entry" was not "consonant with federal law." 20 L Ed 2d at 832.

Since *Miller* and *Sabbath* the Court has clarified several matters. First, absent exigent circumstances, an arrest warrant and reason to believe the person sought is in the dwelling are necessary before a forcible entry may be made into the dwelling of that individual to arrest him or her, see *Payton* v *New York*, 445 US 544, 63 L Ed 2d 639, 100 S Ct 1371 (1980); under *Miller* and *Sabbath*, again unless excused by exigent circumstances, knock and announce principles would also apply. But the question then arose, assuming a violation of *Payton*–an entry to arrest without warrant and

without exigent circumstances justifying its absence–what are the *fruits* of this entry? This question was reached in *New York* v *Harris*, 495 US 14, 109 L Ed 2d 13, 110 S Ct 1640 (1990). There the police made an improper entry because made absent an arrest warrant, and defendant later confessed. But the Court focused on the *nature* of the impropriety–*Payton* was concerned not with warrantless arrests, but warrantless *entries*. Where probable cause exists the seizure of the person is proper; it is the invasion of the privacy of the dwelling which is improper. *Miller* thus spoke overbroadly in referring to the probable cause based arrest after an improper entry as illegal, as the seizure of the person is proper, and only the entry improper. A confession from the defendant, given his valid arrest on probable cause, is thus *not the fruit of the illegality*–the improper entry–but of his valid arrest, and the confession may not be suppressed because of the warrantless entry. The violation of privacy of the dwelling is remedied by suppressing physical evidence found on the premises, if any be found, as it is *this* evidence which is the "fruit" of the improper entry. With regard to the confession it was not "fruit of the poisonous tree" in *Harris* because not "come by by exploitation of the primary illegality."

Subsequent to *Miller* and *Sabbath*, federal circuit courts excluded evidence for violation of 18 USC § 3109 on the *assumption* that exclusion was required by those cases. See e.g. *Search Warrant Dated July 4, 1977*, 667 F2d 117 (CA DC, 1981) ("A failure to comply with section 3109 would lead to the return or suppression of the item wrongfully seized. *Sabbath v. United States, ...; Miller v. United States, ...")*; *United States* v *Baker*, 638 F2d 198 (CA10, 1980); *United States* v *Davis*, 346 F Supp 435 (CD Ill, 1972); *United States* v *Dicesare*, 765 F2d 890 (1985) ("If the officers did violate the statute, the evidence sized during the search must be suppressed" (citing *Miller*)). No attention was paid to whether the evidence was "come by by exploitation of the primary illegality;" that is, whether the evidence discovered

pursuant to a search of proper scope and intensity of premises following the issuance of a valid warrant is indeed the fruit of the "primary illegality"–whether there is *any* causal connection between the improper police conduct, and the discovery of the evidence, *even in a but for sense*! Nor was there any discussion of significant differences between *Miller* and *Sabbath*, involving entries without warrant to effectuate an arrest, which would not justify an invasion of privacy, even where proper, as would the execution of a search warrant, and cases involving the execution of a search warrant, where a neutral and detached judicial officer has made a determination of probable cause and *commanded* the police to search *everywhere* in named premises where the items sought by the warrant might reasonably be expected to be found, a command which the occupants of the premises to be searched have no authority to refuse. The application of an exclusionary sanction to violations of 18 USC § 3109 where a proper search warrant has been executed correctly *except* for an error in the *manner* of entry, and not the *fact* of entry, based on *Miller* and *Sabbath* brings to mind the adage, "Everything looks like a nail when the only tool you have is a hammer."

D. Wilson v Arkansas: Where Should The Law Go From Here?

In *Wilson v Arkansas*, supra, one Sharlene Wilson sold drugs to an informant working for the police, who obtained a search warrant for the premises. Police officers executing the warrant found the main door open, and while opening an unlocked screen door and entering the residence, identified themselves as police officers and stated that they had a warrant. Once inside, the officers seized marijuana, methamphetamine, valium, narcotics paraphernalia, a gun, and ammunition. The Arkansas Supreme Court rejected the "knock and announce" Fourth Amendment claim raised bu Wilson on the ground that knock and announce principles are not constitutional but either statutory or common law.

depending on the jurisdiction, so that no exclusionary sanction could apply. In a unanimous opinion by Justice Thomas, the Supreme Court found that "The common-law knock-and-announce principle was woven quickly into the fabric of early American law," the Court concluding that "Given the longstanding common-law endorsement of the practice of announcement, we have little doubt that the Framers of the Fourth Amendment thought that the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure. Contrary to the decision below, we hold that in some circumstances an officer's unannounced entry into a home might be unreasonable under the Fourth Amendment." The Court limited its holding to "some circumstances" because of the equally well-developed understanding that the rule of announcement has exceptions, put generally, when there is a danger of destruction of the evidence or to the safety of the officers. Because the Arkansas Supreme Court had made no attempt to determine the reasonableness of the entry, given its belief that the question was not one of constitutional dimension, the Court remanded for that Court to make the determination as to whether the entry was reasonable or not.

Importantly, the Court did not reach the question of whether, assuming the entry was unreasonable, an exclusionary sanction was appropriate. Rather, the Court noted in footnote 4 to the opinion: "Respondent and its amici also ask us to affirm the denial of petitioner's suppression motion on an alternative ground: that exclusion is not a constitutionally compelled remedy where the unreasonableness of a search stems from the failure of announcement. Analogizing to the "independent source" doctrine applied in *Segura v. United States*..., and the "inevitable discovery" rule adopted in *Nix v. Williams*,..., respondent and its amici argue that any evidence seized after an unreasonable, unannounced entry is *causally disconnected* from the constitutional violation and that exclusion goes beyond the goal of precluding any benefit to the government

flowing from the constitutional violation. Because this remedial issue was not addressed by the court below and is not within the narrow question on which we granted certiorari, we decline to address these arguments" (emphasis supplied). The question thus remains an open one.

As indicated, both federal circuits and state supreme courts are in disagreement on the question. Amicus submits that the Michigan Supreme Court and the 7th Circuit are correct in their analysis. In the 7th Circuit's decision in *Langford*, Judge Posner, writing for the court, observed that:

> The defendant argues that in any event the police broke down the door of the house without complying with the rule that in the absence of an emergency police executing a search or arrest warrant must knock and announce their purpose and identity and give the occupant a reasonable chance to open the door before they enter forcibly....Whether the police complied with the rule in this case is in dispute, but the dispute need not be resolved because we hold that violation of the rule does not authorize exclusion of evidence seized pursuant to the ensuing search. As we said in *United States v. Jones*, 149 F.3d 715, 716-17 (7th Cir.1998), and now elevate to a holding, "it is hard to understand how the discovery of evidence inside a house could be anything but 'inevitable' once the police arrive with a warrant."...
>
> *****
>
> The fruits of an unlawful search are not excludable if it is clear that the police would have discovered those fruits had they obeyed the law. That is the "inevitable discovery" rule, which the Supreme Court adopted in *Nix*

> *v. Williams*....without it the exclusionary remedy would overdeter; and it is fully applicable here. Armed with a valid search warrant, the police in our case would have discovered the defendant's gun even if they had given him enough time to answer their knock before they broke the front door down....
>
> *Langford*, at 894 -895.

And the Michigan Supreme Court, holding that the sanction of exclusion of inappropriate, put it very similarly.

E. <u>Conclusion</u>

If one asks the *right* question–is evidence discovered as a result of a search of proper scope and intensity pursuant to the command of a valid warrant the effect or fruit of the failure of the police either to knock and announce or to wait long enough before entering, a negative answer follows ineluctably, *unless* a purpose of the knock and announce requirements is to allow those inside an opportunity frustrate the warrant by hiding or destroying evidence or harming the officers who are executing it. The *wrong* question is whether the evidence is the effect or fruit of an "illegal entry" or an "illegal search," as both the entry and the search are legal, it is the *manner* of entry which is improper, and its fruit may be a broken door, and there may be no fruit at all. Exclusion of evidence in this circumstance cannot be squared with *Wong Sun* as there is no exploitation of the primary illegality, the evidence instead being discovered by "exploitation" of the command of the search warrant, not the manner of the entry, and also cannot be squared with either inevitable discovery or independent source principles. The short answer is that but for causation is a necessary but not sufficient requirement for application of the exclusionary rule, as these doctrine demonstrate, and it is *entirely missing here*.

Assume several examples: 1)the police enter a home and search it with no warrant at all, and no exigent circumstances or any other independent justification; 2)the police enter a home and search with a search warrant in areas within the home where the items sought could not possibly be found, finding other seizable items instead, and 3)the police enter a home and search it pursuant to a search warrant, finding the items sought in a search of proper scope and intensity, but after having failed to wait after knocking on the door and announcing their presence and purpose for a time sufficient to allow a person in the room furthest from the door to answer. In the first two situations the invasion of privacy simply *should not have occurred at all*. In the first, the entry into the dwelling *should never have occurred*; in the second, the search of certain places within the dwelling should *never have occurred*. The evidence should never have been discovered, privacy should never have been violated, and exclusion is the result. But in the third situation, with a valid search warrant, and a search of proper scope, but a "timing" error with regard to entry, was the invasion of privacy--the entry into the home and the search--proper? Surely it ***was***--the police had a right under law to make it. Was the seizure of property appropriate? Surely it ***was***--the police had a right under law to seize it. Does employing the ***same*** "sanction" where the police had every right to search and seize, but entered too quickly, as when the police had no right to invade premises and seize property at all make any sense? Surely ***not***--in two privacy has been improperly invaded; in the latter, the knock and announce "failure," it has been *validly* invaded. *Only if knocking and announcing has as a purpose that those inside should be given a fair opportunity either to destroy the evidence sought or to injure the officers executing the warrant does exclusion of the evidence in this situation make sense*. These violations are simply different in *kind*, and, most respectfully, Amicus submit that it is myopic to treat them as though they were no different at all. Exclusion of evidence where there has been a valid invasion of privacy, and a proper discovery and seizure of evidence,

then, is not, Amicus submit, an appropriate sanction for police "error" with regard to announcement of presence and purpose. There is no element of "causality" involved--whether viewed as a part of the doctrine of inevitable discovery, or simply as a recognition that the discovery of the evidence is not the fruit of a failure to knock and announce, given that the invasion of privacy involved is completely justified--and exclusion makes no sense, simply thwarting the enforcement of the law, and giving unwarranted immunity to one in possession of drugs.

Exclusion is not to put the police in a *worse position* than if the improper conduct had not occurred, but to prevent them from being in a *better* position *because* of that conduct. The drugs found here were not the fruit of any knock and announce violation, but Michigan law currently requires suppression nonetheless, without careful consideration of the question. Again, if the search warrant was proper, and the search warrant was properly executed as to a search of proper scope and intensity, then the only way the discovery of contraband or evidence on the premises may be viewed as "poison fruit" is to take the view that the failure to knock and announce deprived those inside the opportunity to destroy or successfully hide the evidence. One would hope that no sane society would take such a view explicitly; the law currently has, however, done so implicitly. This court should repudiate such a principle, particularly given the protection provided by civil damages under 42 USC §1983–which has frequently been employed by those who feel aggrieved by the manner of entry of the police, see e.g. *Aponte Matos v Toledo Davila*, 135 F3d 182 (CA1, 1998)–which serves as an appropriate deterrent to an improper manner of entry.

Conclusion

WHEREFORE, this Court should reverse the holding of the Ninth Circuit Court of Appeals.

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Supreme Court, U.S.
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No. 02-473

In The
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

vs.

LASHAWN LOWELL BANKS,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, AND THE NATIONAL SHERIFFS' ASSOCIATION IN SUPPORT OF PETITIONER.

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This brief is filed pursuant to Rule 37 of the United States Supreme Court. Consent to file has been granted by respective Counsel for the Petitioner and Respondent. The letters of consent have been filed with the Clerk of this Court, as required by the Rules.[1]

INTEREST OF *AMICI CURIAE*

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties, and property, within the framework of the various state and federal constitutions.

AELE has previously appeared as *amicus curiae* over 100 times in the Supreme Court of the United States and over 35 times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio, and Missouri.

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[1] As required by Rule 37.6 of the United States Supreme Court, the following disclosure is made: This brief was authored for the *amici* by James P. Manak, Esq., counsel of record, and Wayne W. Schmidt, Esq., Executive Director of Americans for Effective Law Enforcement, Inc. No other persons authored this brief. Americans for Effective Law Enforcement, Inc., made the complete monetary contribution to the preparation and submission of this brief, without financial support from any source, directly or indirectly.

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world. Founded in 1893, the IACP, with more than 19,000 members in 100 countries, is the world's oldest and largest association of police executives. IACP's mission, throughout the history of the association, has been to identify, address, and provide solutions to urgent law enforcement issues.

The National Sheriffs' Association (NSA), is the largest organization of sheriffs and jail administrators in America, consisting of over 21,000 members. It conducts programs of training, publications, and related educational efforts to raise the standard of professionalism among the nation's sheriffs and jail administrators. While it is interested in the effective administration of justice in America, it strives to achieve this while respecting the rights guaranteed to all under the Constitution.

Amici are national associations representing the interests of law enforcement agencies at the state and local levels. Our members include: (1) law enforcement officers and law enforcement administrators who are charged with the responsibility of overseeing the execution of search warrants and warrantless searches; and (2) police legal advisors who, in their criminal jurisdiction capacity, are called upon to advise law enforcement officers and administrators in connection with such matters, including the formulation and implementation of training and policy on the subject.

Because of the relationship with our members and the composition of our membership and directors, including active law enforcement administrators and counsel, we possess direct knowledge of the impact of the

ruling of the court below, and we wish to impart that knowledge to this Court.

STATEMENT OF THE CASE

At approximately 2 p.m., municipal police officers and FBI agents executed a search warrant for cocaine and drug paraphernalia at respondent's small, two bedroom apartment. The search warrant was based on information, corroborated by a controlled buy, that respondent was selling cocaine at his apartment. Knowing that the apartment was a small, two bedroom unit, the officers first positioned themselves at the front and rear of the apartment and then loudly knocked on the front door and announced "Police search warrant." The knock and announcement was so loud that it could be heard by the officers positioned at the rear door of the apartment.

After waiting 15-20 seconds and, hearing no response, the officers forcibly entered the apartment by breaking down the front door. The officers discovered respondent standing outside the bathroom, having just emerged from the shower; a search of the apartment yielded a number of weapons, at least one of which was loaded, a bullet-proof vest, rock and crack cocaine, and a scale. Respondent was charged with possession of a controlled substance with intent to distribute it and possession of a firearm as an unlawful drug user.

A three judge panel of the Ninth Circuit Court of Appeals, one judge dissenting, reversed respondent's conviction, *United States v. Banks*, 282 F.3d 699 (9th Cir. 2002), ruling that the officers, having knocked and announced and received no response, failed to wait a

reasonable amount of time (15-20 seconds) before forcibly entering the apartment, thereby rendering the search in violation of the Fourth Amendment and the federal statute dealing with the execution of search warrants, 18 U.S.C. 3109.

The dissenting judge in the court below argued that the 15-20 second wait was constitutionally sufficient, emphasizing that the apartment was small, the search was executed in the middle of the afternoon, the officers had strong evidence of drug dealing (including a controlled buy establishing that respondent was selling drugs out of his apartment), and the officers could reasonably have been concerned about the destruction of evidence. He argued that the majority opinion provided no meaningful guidance to law enforcement officers and noted that because respondent was in the shower at the time the officers approached the apartment and did not hear the officers knock and announce, additional delay before entry would have made no difference in how the events unfolded.

The dissenting judge further noted that many courts have held that a 15-20 second (or shorter) delay before entering a residence to execute a search warrant was reasonable under similar circumstances.

SUMMARY OF ARGUMENT

In reaching its decision, the panel (2-1 decision) used a four-part matrix for determining how long officers must wait, after knocking and announcing their presence and hearing no response, before they may enter a residence to execute a valid search warrant. This mechanical approach is inconsistent with this Court's long-standing recognition that the Fourth Amendment does not "mandate a rigid rule of announcement," *Wilson v. Arkansas*, 514 U.S. 927, 934 (1995), and that the "general touchstone of reasonableness * * * governs the method of execution of [search] warrant[s]." *United States v. Ramirez*, 523 U.S. 65, 71 (1998).

Under this four-part matrix, the court below has created four categories of knock and announce scenarios, each requiring a different lapse of time before an officer may enter a residence after knocking and announcing and receiving no response. Police officers must pause and work out the following calculus before deciding how and when to enter premises to serve a search warrant:

- For entries in which exigent circumstances exist and non-forcible entry is possible, entry may be made simultaneously with or shortly after an announcement of the officers' office and purpose.
- For entries in which exigent circumstances exist and forced entry by destruction of property is required, there must be specific inferences of exigency.
- For entries in which no exigent circumstances exist and non-forcible entry is possible, an explicit refusal of admittance or a lapse of a "significant" amount of time is necessary.
- For entries in which no exigent circumstances exist and forced entry by destruction of property is required, there must be an explicit refusal of

admittance or a lapse of an even more substantial amount of time.

This, however, is not the full extent of required calculations for officers. The court's matrix for determining whether officers have waited a sufficient period of time before entering also turns on two additional factors: (1) whether the entry was forcible and thus involved the destruction of property, and (2) whether exigent circumstances existed.

The court then went to yet another level and articulated a non-exhaustive list of factors to be considered in assessing the reasonableness of the officers' waiting period once the proper entry category has been determined by the police. These additional factors must also be used by the police in making their final decision on how and when to make an entry for service of the warrant.

These factors include:

- Size of the residence
- Location of the residence
- Location of the officers in relation to the main living or sleeping areas of the residence (presumably, if known)
- Time of day
- Nature of the suspected offense
- Evidence demonstrating the suspect's guilt
- The suspect's prior convictions and, if any, the type of offense for which he was convicted
- Any other observations triggering the senses of the officers that reasonably would lead one to believe that immediate entry was necessary.

Amici take the position that the court's complex and

confusing categorical scheme is (a) unworkable; and (b) inconsistent with the general reasonableness standard mandated by this Court in prior cases on the subject of the execution of search warrants. This Court has required that the "general touchstone of reasonableness which governs Fourth Amendment analysis * * * governs the method of execution of the warrant." *Ramirez*, 523 U.S. at 71; *Wilson*, 514 U.S. at 934 (the Fourth Amendment does not "mandate a rigid rule of announcement that ignores countervailing law enforcement interests"); and *Richards v. Wisconsin*, 520 U.S. 385, 387 (1997) (same).

In addition to contradicting prior jurisprudence of this Court, the ruling of the court below is contrary to the rulings of the majority of other state and federal courts that have interpreted and applied *Ramirez*, *Wilson*, and *Richards*.

Most importantly from the vantage point of *amici* as law enforcement administrators, we assure the Court that complex rules are patently unworkable in the hands of the best-trained police officers. Officers would be required to work out these rules in a few seconds of time while serving a search warrant. This is not appropriate for officers attempting to act within the short window of time necessary to serve search warrants while defeating the destruction of evidence and ensuring their personal safety.

Amici submit that this calculus was designed for the quiet, post-event reflection of attorneys and judges, not for on-the-scene activities of law enforcement officers carrying out their duties within the requirements of the Fourth Amendment.

ARGUMENT

LAW ENFORCEMENT OFFICERS EXECUTING A WARRANT TO SEARCH FOR ILLEGAL DRUGS DID NOT VIOLATE THE FOURTH AMENDMENT AND 18 U.S.C. § 3109, WHEN THEY FORCIBLY ENTERED A SMALL APARTMENT IN THE MIDDLE OF THE AFTERNOON, 15-20 SECONDS AFTER KNOCKING AND ANNOUNCING THEIR PRESENCE. THE DECISION OF THE COURT BELOW CREATES A COMPLEX AND UNWORKABLE MATRIX OF RULES THAT HAVE BEEN REJECTED BY THIS COURT IN PRIOR CASES DEALING WITH THE EXECUTION OF SEARCH WARRANTS.

Amici support the position of the petitioner, United States of America, and its efforts to eradicate the scourge of drugs in our homeland streets. What has been termed the "war on drugs" is a very real struggle, and police and federal law enforcement agents are front-line combatants. Their actions in serving search warrants is a vital part of that struggle. It involves activity that usually carries great risk to the officers involved and requires the officers to make split-second decisions under great pressure.

As law enforcement administrators, trainers, and legal advisors, *amici* appreciate the need to follow the guidelines of this Court for obedience to the dictates of the Fourth Amendment. We also know that law enforcement officers need clear and workable rules in order to carry out their responsibilities in this area of activity.

Amici filed friend of the court briefs on behalf of law enforcement in *Wilson v. Arkansas*, 514 U.S. 927 (1995), *Richards v. Wisconsin*, 520 U.S. 385 (1997), and *United*

States v. Ramirez, 523 U.S. 65 (1998). In the decisions reached by the Court in these cases, three principles were adopted, among others:

- The Fourth Amendment does not "mandate a rigid rule of announcement." *Wilson*, 514 U.S. at 934.
- Blanket exceptions to the Fourth Amendment knock and announce requirements are not permitted under the Fourth Amendment. *Richards*, 520 U.S. 385 (1997).
- Mechanical formulas for the amount of time officers must wait before making a forcible entry, and property damage as a controlling factor in reaching the decision to make such an entry, were rejected in favor of the "general touchstone of reasonableness . . . [governing] the method of execution of the warrant." *Ramirez*, 523 U.S. at 71 (1998).

In constructing its matrix of rules and sub-rules, the court below has, in effect, rejected the "general touchstone of reasonableness" and the "totality of the circumstances" approach adopted by this Court in *Whren v. United States*, 517 U.S. 806 (1996). It has adopted in its place a mechanical approach rejected by most courts that have applied the Court's cases. *See, e.g., United States v. Pennington*, 2003 U.S. App. Lexis 5832 (6th Cir. 2003) (eight to ten seconds was a reasonable period of time for officers to wait before forcing entry into a home to serve a search warrant for drugs where officers heard a person running away from the door after officers knocked and announced their presence); *United States v. Pinson*, 321 F.3d 558 (6th Cir. 2003) (reasonableness, not time, determines the issue; five to ten seconds delay was reasonable); *United States v. Sargent*, 319 F.3d 4 (1st Cir. 2003) (five seconds between police officers' knock and announcement and a forced entry into an apartment was reasonable based on a threat to the safety of the officers);

United States v. Goodson, 165 F.3d 610 (8th Cir.), cert denied, 527 U.S. 1030 (1999) (delay of 14-20 seconds before a forced entry did not violate the Fourth Amendment where officers searched a one story ranch house for crack cocaine at 1:44 a.m.); *United States v. Jenkins*, 175 F.3d 1208, cert. denied, 528 U.S. 913 (1999) (a delay of 14-20 seconds before forcing entry where search of defendant's residence took place at 10 a.m. was approved); *United States v. Jones*, 133 F. 3d 358 (5th Cir.), cert. denied, 523 U.S. 1144 (1998) (observing that courts have generally found no violation "when officers have waited more than 5 seconds," and holding that "[i]n drug cases, where drug traffickers may so easily and quickly destroy the evidence of their illegal enterprise by simply flushing it down the drain, 15 to 20 seconds is certainly long enough for officers to wait before assuming the worst and making a forced entry."); *United States v. Spikes*, 158 F. 3d 913 (6th Cir. 1998) (declining "to create a bright-line rule for every case, i.e., that waiting less than five seconds is per se unreasonable while waiting more than five seconds is per se reasonable under the Fourth Amendment"; the court held a four-second wait after knocking, preceded by a bullhorn announcement of at least 15 seconds, was sufficient); *United States v. Markling*, 7 F.3d 1309 (7th Cir. 1993) (a delay of seven seconds was sufficient before forcing entry where "[t]here was no noise coming from the apartment * * * that would have made it difficult for [defendant] to hear" the officers' announcement, the "motel room was small," and informants indicated that defendant "was likely to flush the cocaine * * * down the toilet."). *See also*, cases discussed in Schwartz, *Homes as Folding Umbrellas: Two Recent Supreme Court Decisions on "Knock and Announce,"* 25 AM. J. CRIM. L. 545 (1998); Hemmens, *I Hear You Knocking: The Supreme Court Revisits the Knock and Announce Rule*, 66 U. MO. K. C. L. REV. 559 (1998).

Amici know that in drug cases similar to this there are two principal concerns for police officers executing search warrants on premises: (a) the fact that drug sellers are usually armed, and (b) that drug evidence can be disposed of in a few seconds by flushing it down any available plumbing fixture. In this case several weapons were found in respondent's apartment, including at least one that was loaded, and the officers' delay in making their entry was far in excess of that necessary for respondent to destroy the evidence. Based on what was objectively reasonable under the totality of the circumstances, a delay of less than 15-20 seconds would have been permissible for a forcible entry under the precedents of this Court, with or without damage to respondent's door.

While *amici* believe this Court would agree with this statement, we seek another, equally important, resolution of this case. We respectfully ask the Court to discourage, in the clearest terms possible, the adoption by state and federal courts of unduly complex rules for deciding similar cases and to urge these courts to follow this Court's rejection of mechanical, per se approaches. Artificial and strained rules similar to those constructed by the court below are not merely violative of this Court's objective reasonableness standard, but are unworkable and will result in jeopardizing officers' safety and the destruction of evidence, while defeating the Fourth Amendment's core warrant preference.

CONCLUSION

Amici urge this Court to uphold the constitutionality of the police conduct involved in this case with a clear statement that the approach taken by the court below violates the standard of objective reasonableness adopted by this Court in *Wilson*, *Richards*, and *Ramirez*.

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In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

LASHAWN LOWELL BANKS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

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CERTIORARI GRANTED: Feb. 24, 2003

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

No. 98-0269

UNITED STATES OF AMERICA

v.

LASHAWN LOWELL BANKS

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
	* * * * *	
07/23/98	4	**TRANSCRIPT OF MAGISTRATE PAPERS** frm dist of NV in Mag Case #98-2183-M-RLH re: D/Banks: a) **COMPLAINT** o/d 7/15/98 (fld 7/16/98) b) **WARRANT** iss'd to USM re: D/Banks dtd 7/16/98 c) **MINUTES OF INITIAL APPEARANCE** re: D/Banks

DATE	DOCKET NUMBER	PROCEEDINGS
		(RLH) ORD 1) Govt mves for deten; Deten hrg set for MON, 7/20/98 @ 2:00pm; Dfs cnsl wll also be confrmd @ ths time (Tape #98-3-61) cps dist
		d) **ORDER OF TEMPORARY DE TENTION** re: D/Banks dtd 7/16/98 (RLH)ORD: D detnd pend deten hrg set for MON, 7/20/98@ 2:00pm in Ctrm #4, 2nd flr cps dist
		e) **WARRANT** w/USM retd, D/Banks arr 7/16/98
		f) **MOTION** obo D/Banks for Reconsdrtn of Deten Ord (f) (Dispo: Denied # sg
		g) **MINUTES OF FURTHER PROCEEDINGS** re:D/Banks Deten hld on 7/20/98 (fld 7/21/98) (RLH) ORD 1) Prelim Hrg set for WEDS, 7/29/98 @4:00pm 2) Govt mves for deten; Crt hrs argmnt; P/T deten ord (Tape #98-3-62) cps dist
		h) **ORDER OF DETENTION** re: D/Banks dtd 7/20/98 (RLH) ORD: D detnd pend trl cps dist

DATE	DOCKET NUMBER	PROCEEDINGS
		i) **MINUTE ORDER** re: D/Banks dtd 7/23/98 (RLH) ORD; GJ retd Indctmnt on 7/22/98 in CR-S-98-269-JBR (RLH); Prelim Hrg vctd; A/P set for FRI, 7/31/98 @ 8:30am in Ctrm #4, bfr LRL cps dist lsd
		* * * * *
12/23/99	48	**MOTION** obo D/Banks to Suppr (Evid Hrg Rqstd) (m) lsd (Dispo: Resp #50; mins #52; R&RH 53; JBJS #55; DENIED ORD #57)
		* * * * *
01/06/00	50	**RESPONSE** by Govt To D/Banks' Mtn To Suppr (#48) (m) lsd
		* * * * *
03/20/00	55	**OBJECTIONS** obo D/Banks To Mag's R/R (#53) re: Mtn To Suppr (#48) (m) lsd (Dispo: DENIED #58)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
04/18/00	59	**ORDER** re: D/Banks' Ojbs (#55) To Mag's R/R (#53) (JBR) ORD 1) Mag's R/R (#53) ADOPTED 2) D's Mtn To Suppr (#48) DENIED (EOD 4/19/00) cps dist lsd
		* * * * *
09/05/00	73	**JUDGMENT** re: D/Banks (JBR) ORD as to Glty Plea to Cts 1 & 2: 1) 135 mos cstdy USBOP (135 mos as to ea ct & bth cts to run concrrnt w/ea othr) 2) Remnded to cstdy USBOP 3) 5 yrs Sprvsd Rels (see doc for spec conds) 4) $200 Assessmnt 5) Fine waivd 6) Sent dprts frm gdlne range due to ovr-reprsntatn of CR hstry catgry (EOD 9/7/00) cps dist lsd (*5 yr Denial Of Fed Bnfts purs to 21/862)
		* * * * *

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-10439

UNITED STATES OF AMERICA

v.

LASHAWN LOWELL BANKS

DOCKET ENTRIES

DATE	PROCEEDINGS
10/12/00	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. Filed in D.C. on 9/18/00; setting schedule as follows: transcript shall be ordered by 10/9/00 for Lashawn Lowell Banks; transcript shall be filed by 11/8/00; appellant's briefs, excerpts due by 12/18/00 for Lashawn Lowell Banks; appellee's brief due 1/17/01 for USA; appellant's reply brief due by 1/31/01 for Lashawn Lowell Banks. (RTrequired: y) (Sentence imp 135 months) [00-10439] (dv)
10/13/00	Criminal Justice Act voucher sent () to Randall J. Roske for Appellant Lashawn Lowell Banks [00-10439] (tu)

DATE	PROCEEDINGS
2/1/01	Filed motion and order PROMO (Deputy Clerk: jlc) the opening brief in this appeal was due on 12/18/00. The ct is now in receipt of aplt's late mtn for an ext of time to file the opening brief. The mtn is GRANTED, however, in view of the delay in the prosecution of this appeal any further ext of time to file the opening brief is DISFAVORED. The briefing schedule is as follows: the opening brief and excerpts of record are due 2/22/01, the answering brief is due 3/26/01, and the optional reply brief is due 14 days from service of the answering brief . . . (FOR COMPLETE TEXT SEE ORDER) (Motion recvd 1/30/01) [00-10439] (rc)
2/23/01	Filed motion and order (Deputy Clerk: jlc) Appellant's second late motion for an extension of time to file the opening brief is DENIED. The opening brief and excerpts of record are now due March 9, 2001, the answering brief is due April, 9 2001, and the optional reply brief is due 14 days from service of the answering brief. (PROMO) (Motion recvd 02/20/01) [00-10439] (dv)
3/12/01	Filed original and 15 copies aplt's opening brief of 18 pages; and 5 excerpts of record in 2 volumes; served on 03/09/01. (Informal: No) [00-10439] (dv)

DATE	PROCEEDINGS
4/6/01	14 day oral extension by phone of time to file brief. [00-10439] appellants' brief due 4/23/01; appellees' brief due 5/23/01; the optional reply brief is due 14 days . . . (king)
4/30/01	Filed original and 15 copies appellee USA's answering brief of 19 pages brief and 5 supplemental excerpts of record; served on 4/23/01. [00-10439] (dv)
5/29/01	Filed original and 15 copies aplt's reply brief of 13 pages served on 5/24/01. (Informal: No) [00-10439] (dv)
6/5/01	Calendar check performed [00-10439] (mw)
7/9/01	Calendar materials being prepared. [00-10439] [00-10439] (mw)
7/11/01	CALENDARED: SAN FRAN Sept 10 2001 1:30 pm Courtroom 3 [00-10439] (aw)
8/16/01	CJA travel authorization sent (Authorization # 9CJA00-105390901) to Randall J. Roske for Appellant Lashawn Lowell Banks. [00-10439] (mv)
9/10/01	ARGUED AND SUBMITTED TO Henry A. Politz, William A. FLETCHER, Raymond C. FISHER [00-10439] (sa)

DATE	PROCEEDINGS
11/2/01	Filed certificate of record on appeal; RT filed in DC on 10/26/01. [00-10439] (dv)
3/5/02	FILED OPINION: AFFIRMED in part, REVERSED in part and REMANDED. (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. Henry A. Politz, author; William A. FLETCHER; Raymond C. FISHER, Partial Concurrence and Partial Dissent) FILED AND ENTERED JUDGMENT. [00-10439] (dv)
3/18/02	Filed motion of Appellee and order (Deputy Clerk dv) Aple's motion for an extension of time for leave to file a petition for rehearing with suggestion for rehearing en banc is granted the petition for rehearing is now due 04/18/02. [4390850-1] (Motion recvd 03/11/02) [00-10439] (dv)
4/18/02	[4412254] Filed original and 50 copies aple USA's petition for rehearing with suggestion for rehearing en banc of 13 pages; served on 04/17/02. (PANEL AND ALL ACTIVE) [00-10439] (dv)
5/24/02	Filed order (Henry A. Politz, William A. FLETCHER, Raymond C. FISHER) Judges Politz and W. Fletcher have voted to deny the petition for rehearing, and Judge Fisher has voted to grant the

DATE	PROCEEDINGS
	petition for rehearing. Judges W. Fletcher and Fisher have voted to deny the petition for rehearing en banc and Judge Politz so recommends. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. The petition for rehearing and the petition for rehearing en banc filed 04/19/02 are DENIED. [4412254-1] [00-10439] (dv)
6/3/02	MANDATE ISSUED [00-10439] (dv)
8/2/02	Received plaintiff-aple USA's motion to recall the mandate; served on 07/31/02. (PANEL) [00-10439] [4496501] (dv)
8/6/02	Filed order (Raymond C. FISHER,) aple's motion to recall the mandate filed 08/02/02 is GRANTED. It is ordered the mandate is stayed pending the filing of the petition for writ of certiorari in the Supreme Court on or before 10/05/02. (PHONED OUT AT 12:30 p.m.) [4496501-1] [00-10439] (dv)
8/13/02	Received Appellee USA letter dated 08/12/02 re: Notice of case developments. 1). On 08/02/02 USDC ordered the release of def from custody. 2). have received word on 08/0702 Solicitor General authorized the filing of petition for writ of cert in the US Supreme Court. (PANEL) [00-10439] (dv)

DATE	PROCEEDINGS
8/19/02	Received letter from the Supreme Court dated 8/14/02 re: The application for an ext. of time within which to file a petition for a writ of certiorari in the above-entitled cs has been presented to Justice O'Connor, who on 8/14/02, extended the itme to and including 9/21/02. (CASEFILES) [00-10439] (af)
8/19/02	Received copy of District Court order filed on 08/02/02; defendant is released on a Personal Recognizance bond.; status conference set for 10/04/02 at 9:30 am (casefile) [00-10439] (dv)
9/30/02	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 02-473 filed on 09/23/02 and placed on the dkt on 09/23/02. [00-10439] (dv)
2/28/03	Received notice from Supreme Court, petition for certiorari GRANTED on 02/24/03. Supreme Court No. 02-473 (dv)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

No. CR-S-98-269
[JBR (KLH)]

UNITED STATES OF AMERICA, PLAINTIFF

v.

LASHAWN LOWELL BANKS, DEFENDANT

Filed July 22, 1998

CRIMINAL INDICTMENT

Violation: 21 U.S.C. § 841(a)(1) – Possession of Controlled Substance With Intent to Distribute; 18 U.S.C. § 922(g)(3) – Drug User in Possession of Firearms

THE GRAND JURY CHARGES THAT:

COUNT ONE

(Possession of Controlled Substance with Intent to Distribute)

On or about July 15, 1998, in the State and Federal District of Nevada,

defendant herein, knowingly and intentionally possessed approximately eleven ounces of cocaine base, a Schedule II Controlled Substance, with intent to distribute; in violation of Title 21, United States Code 841(a)(1).

COUNT TWO

(Drug User in Possession of Firearm)

On or about July 15, 1998, in the State and Federal District of Nevada,

LASHAWN LOWELL BANKS

defendant herein, being an unlawful user of a controlled substance, to wit: cocaine and cocaine base, did knowingly possess in and affecting commerce firearms that is: a Desert Eagle .40 caliber semi-automatic pistol, serial number 9631432; a Lorcin .380 caliber semi-automatic pistol, serial number 374026; and, a Beretta .22 caliber semi-automatic pistol, serial number BER 587551, each of which firearms had been shipped and transported in interstate commerce, in violation of Title 18, United States Code, Section 922(g)(3).

DATED: This 22 day of July 1998.

A TRUE BILL:

/s/ NANCY P. WILLIAMS
FOREPERSON OF THE GRAND JURY

KATHRYN E. LANDRETH
United States Attorney
/s/ L.I. O'NEALE
L.I. O'NEALE
Assistant United States Attorney

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CR-S-98-269 BR(RLH)

UNITED STATES OF AMERICA, PLAINTIFF

v.

LASHAWN LOWELL BANKS, DEFENDANT

[Filed: Dec. 23, 1999]

MOTION TO SUPPRESS
(EVIDENTIARY HEARING REQUESTED)

COMES NOW the Defendant, LASHAWN LOWELL BANKS, by and through his appointed Counsel, Randal J. Roske, Esquire, and moves this Honorable Court for its order granting him an evidentiary hearing and an order suppressing the tangible and intangible fruits of the illegal search and seizure alternative grounds for suppression of statements is based upon the lack of voluntariness of Mr BANKS statements. This motion is supported by the attached memorandum of points and authorities papers and pleadings attached hereto.

Dated this 23 day of December, 1999.

/s/ RANDALL J. ROSKE
RANDALL J. ROSKE, Esquire
511 South Tonopah Drive
Las Vegas, NV 89106-4026
Counsel for Defendant
LASHAWN LOWELL BANKS

MEMORANDUM OF POINTS AND AUTHORITIES

I. THE FACTS

On July 16, 1998, a warrant for the arrest for LASHAWN LOWELL BANKS (hereinafter LASHAWN) was issued by Magistrate Judge Hunt. This was based upon a criminal Complaint filed charging LASHAWN with possession of a controlled substance and ex-felon in possession of a firearm. The Complaint was based upon an affidavit which recounted facts from a search warrant issued at the request of North Las Vegas Police Department on July 8, 1998, by Stephen J. Dahl, Justice of the Peace North Las Vegas Township.

The affidavit in support of the search warrant (attached as Exhibit A) states the following facts:

1. That North Las Vegas Police Department Office Wilson Crespo spoke with an undisclosed person (denominated as a reliable confidential informant or "CI") who stated he could buy cocaine from "Shakes" at 1404 Henry Drive in North Las Vegas Nevada. "Shakes" was not further identified as being male /female, black/white or any other distinctive characteristic.

2. Officer Wilson Crespo vouched for the "CI" for participating in numerous times in controlled buys yielding "numerous pounds of cocaine, methamphetamine, marijuana, and money".

3. That Officer Wilson Crespo gave $200 from the "narcotic buy fund" to the "CI" after searching his person for "drug or monies".

4. The "CI" then went into Apartment D located at 1404 Henry Drive, knocked on the door and entered the apartment. After "a few minutes" the "CI"

came out to the undercover officer Crespo's vehicle. The "CI" then handed Officer Crespo two large off-white rocks of cocaine which the "CI" said he purchased from a person only identified as "Shakes". (Id.)

5. A "NIK" field test kit was used to validate the rock was presumptively positive for cocaine. The total weight of the "large rocks" was 7.55 grams. (Id.)

No other information specific to the investigation was set forth making any attempt to particularly describe the person identified only as "Shakes" although common sense would dictate this information would be of obvious relevance to an investigating officer.

On July 15, 1998, officers and agents of the North Las Vegas Federal Drug Task Force conducted a daytime search of 1404 Henry Drive, Apartment D in North Las Vegas, Nevada. The search occurred at 2:15 p.m. When the officers arrived, their report (please see Exhibit B North Las Vegas Police Report dated 7/15/98 at page five) reflects that they knocked on the door and announced "Police Search Warrant" and they waited for an unspecified period of time and then battered in the door. The Defendant was located in the hallway naked and dripping wet with soap on his body. (Id.)

According to the Narrative Summary, 11 ounces of cocaine base were found in Apartment D along with three handguns and $6,095. LASHAWN was at gun-point taken into custody by SWAT team officers armed with automatic weaponry. LASHAWN was ordered to the floor and one officer rushed over to him armed with a machine gun wearing all black and a hood and put his weight on his knee which was on LASHAWN's back. At

the same instant the officer put the barrel of his weapon on LASHAWN's head. LASHAWN, at that moment, believed his life hanged on the finger of the officer's machine gun. At that moment, LASHAWN was unsure whether he was in custody or whether he was a victim of a robbery (please see Affidavit of Counsel, Exhibit C). Slowly, LASHAWN, who was highly intoxicated, from smoking crack and marijuana, began to realize that the armed intruders were police. After what seemed an eternity, the officer who held the gun to LASHAWN's head took his weight off his knee (which was pinning LASHAWN to the floor). LASHAWN was escorted under this coercion and duress of automatic weaponry to the kitchen table where he was tossed some underwear and told to sit down and not move. LASHAWN complied with their every request, fearing that any hesitation or resistance would result in a beating or his death.

In the coercive setting of his intoxication and under the excitement of the breaking and entry and detention LASHAWN was given "Miranda Warnings." He was directed to sign waivers. He was also instructed to sign consents to search his vehicle.

As the agents proceeded to search, they loudly announced their discoveries, "translating" the amounts of controlled substances into years of incarceration. Weapons were also located during the search. Each weapon was presented to LASHAWN and he was interrogated as to the ownership of same. A bullet proof vest was also discovered and its ownership was confirmed. It is noteworthy that the "Narrative Summary" substantiates LASHAWN's intoxication on controlled substances when raid took place. In the "Narrative Summary," it states in the fourth paragraph. "Banks admits that the money, guns, and cocaine belonged to him and that he not only sold

cocaine, but he used some of it for his personal consumption."

After gaining various admissions from LASHAWN, the officers turned their attention on identifying who the suppliers of LASHAWN were. LASHAWN advised that he was reluctant to disclose his suppliers because "they were like family to him." LASHAWN made a request for counsel and at that juncture interrogation ceased.

LASHAWN was the transported to jail and booked into state custody. LASHAWN thereafter was taken into federal custody on a warrant for arrest issued by Magistrate Judge Hunt.

II. THE LAW

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon provable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the things to be seized.

In this case, Officer Crespo sought a search warrant to seize an "unknown quantity of cocaine", "paraphernalia", and "personal property which would tend to establish a possessing interest in the items seized." (Please see search warrant attached hereto as Exhibit D) In application and affidavit for search warrant, Officer Crespo recounts the following facts as "probable cause":

1. A "confidential informant" stated "they (sic) could buy rock cocaine at 1404 Henry Drive" from a subject known only as "Shakes."
2. That the informant has been used in an unspecified number of controlled buys yielding "pounds of cocaine, methamphetamine, marijuana and money."
3. That Officer Crespo searched the informant for contraband and found none.
4. That Officer Crespo drove the informant to 1404 Henry Drive. The informant was let out and he walked out to the apartment, was let in and remained inside for a "few minutes."
5. The informant left the apartment thereafter and approached Officer Crespo. The informant "handed two large off-white colored rock (sic) of cocaine" which the CI stated had been purchased rom the subject named "Shakes" with the aforementioned buy money.
6. A field of forensic test was done on the two "rocks" and a presumptive result was positive for cocaine. The weight of the rocks was 7.55 grams.

The balance of the Affidavit is devoted to various conclusions and opinions as to what kinds of evidence would be found. The application was made on July 8, 1998, but the search did not occur until July 15, 1998 at 14:15 hours or 2:15 p.m. (some seven days later). The North Las Vegas Police Officers were acting jointly with the agents of the Federal Bureau of Investigation. In fact the interrogation of LASHAWN was performed by agents of the FBI. Special Agent Tomasso (Please

see FBI 302 Report, Investigated on July 15, 1998 and dictated on July 15, 1998). In this case, the joint task force apparently knocked on the door, but did not announce their authority and purpose as required by Title 18 U.S.C. § 3109. The door was then battered in after an unspecified amount of time after the knock.

A. The Fourth Amendment and Title 18 U.S.C. § 3109 requires that announcement of "authority and purpose" before the forcible entry can be lawfully accomplished.

The Fourth Amendment guarantees members of the public security from unreasonable searches and seizures. The zone or area accorded the greatest sanctity from intrusions by law enforcement in one's own home or abode. This is explained by a variety of the United States Supreme Court cases as a reflection of our society's recognition that people have the greatest legitimate expectation of privacy in the greatest legitimate expectation of privacy in their own homes.[1]

Here, the reports indicate that LASHAWN never heard this and it is believed that if any announcement was made, it was with insufficient volume to effectuate actual notice to LASHAWN. No justification for failure to warn was set forth in the police reports or FBI discovery. The rationale for announcement is that it is preferable to allow voluntary compliance when ever feasible. In *Ker* v. *California*, 374 U.S. 23 (1963) the announcement rule was recognized as a constitutional requirement which if not adhered to can invalidate an otherwise lawful search. What is beyond civil is that the entry by law enforcement was a "breaking" as a result of force [See, *Sabbath* v. *United States*, 391 U.S.

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[1] *Caldwell* v. *Lewis*, 417 U.S. 583, 590 (1974). *South Dakota* v. *Opperman*, 428 U.S. 364 (1976). *Mapp* v. *Ohio*, 367 U.S. 643 (1961).

585 (1968)] Here, entry was effectuated by a ram device.

Because the requirements of the "announcement" of Title 18 U.S.C. § 3109 were not met, fruits of the search, drugs, firearms and confession, must be suppressed as "fruits of the poisonous tree." [Please see *Wong Sun v. United States*, 371 U.S. 471 (1963).

B. The confession must be suppressed as a violation of the Fourth and Fifth Amendments.

LASHAWN was interrogated after the entry into the apartment. As items were seized, agents/police officers translated the amounts seized into prison time. When the agents/police officers entered the apartment, LASHAWN was under the impression that he was the victim of an armed robbery. The excitement and terror permeated his detention and interrogation. LASHAWN was also highly intoxicated. Despite Miranda warnings being given, LASHAWN did not make a voluntary confession.

Voluntariness of a confession requires an examination of the totality of circumstances including the history of the accused education physical condition in addition to the circumstances surrounding the actual statement. *Crane v. Kentucky*, 476 U.S. 683 (1986); *Mince v. Arizona*, 437 U.S. 385 (1978).

After a hearing, evidence justifying suppression of the post detention statements will be clear. A hearing developing the facts must be held to address these issues.

III. CONCLUSION

Wherefore in light of the foregoing, it is respectfully urged that an evidentiary hearing be held and the tangible and intangible evidence be suppressed.

Respectfully submitted,

/s/ RANDALL J. ROSKE

RANDALL J. ROSKE, Esquire
511 South Tonopah Drive
Las Vegas, NV 89106-4026
Counsel of Defendant
LASHAWN LOWELL BANKS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is a person of such age and discretion as to be competent to serve papers.

That on December 23, 1999, she served the Motion to Suppress by placing said copy in a post-paid envelope, addressed to the person(s) hereinafter named, at the address(es) stated below, which is/are the last known address(es), and by depositing said envelope(s) and contents in the United States mail at Las Vegas, Nevada, by hand delivery.

Address(es): United States Attorney
701 E. Bridger, Suite 800
Las Vegas, NV 89101

/s/ STACEY L. STIRLING
STACEY L. STIRLING

APPLICATION AND AFFIDAVIT
FOR SEARCH WARRANT

[Filed: July 14, 1998]

STATE OF NEVADA)
) ss:
County of Clark)

OFFICER W. CRESPO being first duly sworn, deposes and states on information and belief that Affiant is an officer with the North Las Vegas Police Department presently assigned to the Narcotics Unit, has been with the North Las Vegas Police Department for over eight (8) years and has been assigned to the Narcotics Unit for over one (1) year.

There is probable cause to believe that certain property hereinafter described will be found at the following described premises, to - wit:

1404 Henry Drive apartment "D", City of Las Vegas 89100, County of Clark, State of Nevada, more particularly described as a two story four-apartment, tan in color with brown trim. The front door, which has the letter "D" on the door, is on the second floor and faces north.

The property referred to and sought to be seized consists of the following:

1. An unknown quantity of cocaine.
2. The paraphernalia commonly associated with the ingestion and distribution of the controlled substance cocaine such as scales, packaging materials and "cut," grinders customer and

source lists, recordations of purchases and sales including "owe sheets" reflecting transactions in the controlled substance cocaine.

3. Limited items of personal property which would tend to establish a possessory interest in the items seized pursuant to this search warrant, such as personal identification, photographs, utility company receipts or addressed envelopes.

and as I am satisfied that there is probable cause to believe that said property is located as set forth above and that based upon the Affidavit attached hereto there are sufficient grounds for the issuance of the Search Warrant.

The property described constitutes evidence which tends to demonstrate that the criminal offenses of the Uniform Controlled Substances Act, NRS Chapter 453, have been and continue to be committed.

In support of your Affiant's assertion to constitute the existence of probable cause, the following facts are offered based on your Affiant's personal knowledge and on information and belief.

On 070798 Affiant contacted a reliable confidential informant (CI) who stated that they could buy rock cocaine from an apartment located at 1404 Henry Drive from a subject known only as "Shakes".

This same CI has been used numerous times in the past in controlled narcotics buys. These buys have lead to the seizure of numerous pounds of cocaine, methamphetamine, marijuana, and money. Affiant obtained $200.00 from the North Las Vegas Police Department (NLVPD) narcotics buy fund.

The CI was searched for any contraband or monies and none were found.

Affiant drove to the area of 1404 Henry Drive accompanied buy the CI while NLVPD Narcotics officers established surveillance in that area.

Affiant gave the CI the aforementioned $200.00. The CI then exited the vehicle and walked to 1404 Henry Drive while under constant surveillance. The CI walked to apartment "D". Upon knocking, the door opened and the CI was let in. After a few minutes the CI exited the apartment and walked directly back to Affiant's vehicle. The CI handed Affiant two large off - white colored rock of cocaine which the CI stated had been purchased from the subject named "Shakes" with the aforementioned buy money. The CI was searched again and no monies or contraband were found.

Affiant took custody of the cocaine and transported it to the NLVPD where it tested positive as cocaine with a total weight of 7.55 grams. The cocaine was booked into evidence along with a copy of the NIK test checklist.

A copy of the NIK test is attached.

Based on the Affiant's training and experience and on the information received from the reliable CI, it appears that the person or persons in control of the suspect premises are engaged in selling rock cocaine.

Also, persons involved in selling narcotics will frequently have at least some quantity of drugs on their persons and will utilize confederate agents and runners to assist them, and for this reason, Affiant prays that this warrant authorize a search of the persons found at the suspect premises during the execution of this warrant and the motor vehicles in which they have possessory interest.

Furthermore, Affiant knows from his training and experience, that persons who sell narcotics frequently will have ledgers and customer lists pertaining to their

illegal business. Also, narcotics dealers will need to have packaging materials, scales, cutting agents and like items to prepare and package controlled substances for sale.

Affiant wishes to continue to use the CI in controlled buy situations, and therefore, asks that the Application and Affidavit be ordered Sealed pending further Order of this Court in order to protect the identity of the CI and to use CI in further buys without potentially and possibly identifying CI.

Affiant prays that a nighttime search warrant be authorized due to the fact that several children have been playing in the area of 1404 Henry Drive. A nighttime clause would give Affiant the option of serving the search warrant when it would not endanger these innocent persons.

WHEREFORE, Affiant requests that a Search Warrant issue directing a search for and seizure of the aforementioned items at the location set forth herein and authorizing a nighttime search.

/s/ W. CRESPO
W. CRESPO

/s/ STEPHEN J. DAHL
STEPHEN J. DAHL
Justice of the Peace
North Las Vegas Township

SUBSCRIBED and SWORN to before me
this 8th day of July, 1998

[Filed: July 14, 1998]

IN RE: SEARCH WARRANT FOR

1404 Henry Drive apartment "D", City of Las Vegas 89100, County of Clark, State of Nevada, more particularly described as a two story four-apartment, tan in color with a brown trim. The front door, which has the letter "D" on the door, is on the second floor and faces north.

ORDER SEALING AFFIDAVIT

Upon the ex parte application of W. Crespo, a commissioned officer with the North Las Vegas Police Department and Affiant, to seal the affidavit in support of the attached search warrant, and for good cause appearing therefore,

IT IS HEREBY ORDERED that the Affidavit in support of the attached search warrant be ordered sealed pending further order of this Court except that copies may be provided to the office of the Clark County District Attorney and the District Attorney may provide copies to a Defendant in a criminal proceeding as part of the criminal discovery process, and

IT IS FURTHER ORDERED a copy of this order sealing the affidavit be left at the premises along with the search warrant in lieu of the affidavit in support of the warrant.

DATED this 8th day of July, 1998.

/s/ STEPHEN J. DAHL
STEPHAN J. DAHL
Justice of the Peace
North Las Vegas township

/s/ W. CRESPO
W. CRESPO

CASE: 98011333 ----NORTH LAS VEGAS POLICE DEPARTMENT---- REF: ORIGINAL
DATE: 7/16/98 ----------POLICE REPORT---------- PAGE: 1
TIME: 15:42 ----------INVESTIGATIVE PORTION---------- OF: 6

----------INCIDENT ORIGINAL----------

classification/additional information: | gang related?
TCS (COCAINE) HIGH LEVEL (OVER 28 GRAMS) | NO

invest bureaus/units notified:

location of occurrence: | rpt. dist: OJ neighborhood: XXX
1404 HENRY #D | OTHER JURIS OTHER JURISDICTION

from: date / time	to: date / time	report: date / time
	7/15/98 / 14:15	7/15/98 / 14:15	7/15/98 / 14:15

hate crime? NO | fingerprints? NO |

routing?	prosecute?	prop report?	vehl report?	arrest rpt?	attach?
OTHER	YES	NO	NO	ADULT ONLY	

----------METHOD OF OPERATION----------

residential---type: target: security:

non-residtl---type: target: security:

entry----location: method:
exit----location: method:

suspect actions:
A. B. C.
D. E. F.
G. H. I.

----------DISPOSITIONS----------

[ ]-UNFOUNDED/NO CRIME--0 [ ]-SUBMITTED D.A.------5 [ ]-RECLASSIFY---------10
[ ]-JUVENILE------------1 [ ]-ADMIN. CLEARED------6 [ ]-VIC REFUSED PROS.--11
[ ]-NON DETECTIVE CLR---2 [ ]-EXCEPTIONALLY CLR---7 [ ]-AFFIDAVIT----------12
[ ]-DETECTIVE ARREST----3 [ ]-SCREEN CLEARED------8 [ ]-CA/DA DENIAL-------13
[ ]-SUBMITTED CITY ATTY-4 [ ]-NO CHGS FILED(NCF)--9 [ ]-OTHER--------------14

----------RECORDS----------

class code---ucr	sid number	enter scope date ser no	cleared scope date ser no

records bureau processed ser no	detective bureau processed ser no

supervisor approving ser no	officer reporting ser no
	CRESPO/WILSON 0750

CASE: 98011333 ----NORTH LAS VEGAS POLICE DEPARTMENT---- REF: ORIGINAL
DATE: 7/16/98 ----------POLICE REPORT---------- PAGE: 2
TIME: 15:42 ----------PERSONS PORTION---------- OF: 6

name of person (001):	type: W	occupation:	susp id?
JACKS/DAVE	WITNESS	SGT.	YES

sex	race:	hisp:	dob	age	hgt	wgt	hair	eyes	bld	cmp
					000	000				

alias-aka: P#0753 | birthplace:
alias-aka: | ssn: mf no:

addr:
business: NLVPD 1301 LMBE NLV, N.V. 89030 | 633-1793

descriptors:
descriptors:

name of person (002):	type: W	occupation:	susp id?
MELGAREJO/EDWING	WITNESS	INVESTIGATOR	YES

sex	race:	hisp:	dob	age	hgt	wgt	hair	eyes	bld	cmp

alias-aka: P#0837 | birthplace:
alias-aka: | ssn: mf no:

addr:
business: NLVPD 1301 LMBE NLV, N.V. 89030 | 633-1793

descriptors:
descriptors:

name of person (003):	type: W	occupation:	susp id?
WALLIND/BRAD	WITNESS	INVESTIGATOR	YES

sex	race:	hisp:	dob	age	hgt	wgt	hair	eyes	bld	cmp

alias-aka: P#0792 | birthplace:
alias-aka: | ssn: mf no:

addr:
business: NLVPD 1301 LMBE NLV, N.V. 89030 | 633-1793

descriptors:
descriptors:

records bureau processed ser no	detective bureau processed ser no

supervisor approving ser no	officer reporting ser no
	CRESPO/WILSON 0750

CASE: 98011333 ----NORTH LAS VEGAS POLICE DEPARTMENT---- REF: ORIGINAL
DATE: 7/16/98 ----------POLICE REPORT---------- PAGE: 3
TIME: 15:42 ----------PERSONS PORTION---------- OF: 6

name of person (004):	type: W	occupation:	susp id?
CORRADO/CHRIS	WITNESS	INVESTIGATOR	YES

sex	race:	hisp:	dob	age	hgt	wgt	hair	eyes	bld	cmp

alias-aka: P#0838 birthplace:
alias-aka: ssn: mf no:

addr:
business: NLVPD 1301 LMBE NLV, N.V. 89030 633-1793

descriptors:
descriptors:

name of person (005):	type: W	occupation:	susp id?
PEARSON/DON	WITNESS	INVESTIGATOR	YES

sex	race:	hisp:	dob	age	hgt	wgt	hair	eyes	bld	cmp

alias-aka: P#0997 birthplace:
alias-aka: ssn: mf no:

addr:
business: NLVPD 1301 LMBE NLV, N.V. 89030 633-1793

descriptors:
descriptors:

name of person (006):	type: W	occupation:	susp id?
TOMASSO/RICHARD	WITNESS	SPECIAL AGENT	YES

sex	race:	hisp:	dob	age	hgt	wgt	hair	eyes	bld	cmp

alias-aka: P#5891 birthplace:
alias-aka: ssn: mf no:

addr:
business: FBI 700 E. CHARLESTON LV, N.V. 89104 385-1281

descriptors:
descriptors:

records bureau processed	ser no	detective bureau processed	ser no
supervisor approving	ser no	officer reporting	ser no
		CRESPO/WILSON	0750

CASE: 98011333 ----NORTH LAS VEGAS POLICE DEPARTMENT---- REF: ORIGINAL
DATE: 7/16/98 ----------POLICE REPORT---------- PAGE: 4
TIME: 15:42 ----------PERSONS PORTION---------- OF: 6

name of person (007):	type: W	occupation:	susp id?
LEON/DAN	WITNESS	SPECIAL AGENT	YES

sex	race:	hisp:	dob	age	hgt	wgt	hair	eyes	bld	cmp

alias-aka: P#7690 birthplace:
alias-aka: ssn: mf no:

addr:
business: FBI 700 E. CHARLESTON LV, N.V. 89104 385-1281

descriptors:
descriptors:

name of person (008):	type: W	occupation:	susp id?
MOE/MITCH	WITNESS	SPECIAL AGENT	YES

sex	race:	hisp:	dob	age	hgt	wgt	hair	eyes	bld	cmp

alias-aka: P#14090 birthplace:
alias-aka: ssn: mf no:

addr:
business: FBI 700 E. CHARLESTON LV, N.V. 89104 385-1281

descriptors:
descriptors:

records bureau processed	ser no	detective bureau processed	ser no
supervisor approving	ser no	officer reporting	ser no
		CRESPO/WILSON	0750

CASE: 98011333 ----NORTH LAS VEGAS POLICE DEPARTMENT---- REF: ORIGINAL
DATE: 7/16/98 ----------POLICE REPORT---------- PAGE: 5
TIME: 15:42 ----------NARRATIVE PORTION---------- OF: 6

ON 07/15/98 AT ABOUT 1415 HOURS THE NLVPD NARCOTICS UNIT AND FBI SERVED A EARCH WARRANT AT 1404 HENRY APARTMENT #D.

WE KNOCKED AND ANNOUNCED "POLICE SEARCH WARRANT", AFTER WAITING A EASONABLE TIME FORCED ENTRY WAS MADE. THE OCCUPANT, LAWSHAWN LOWELL BANKS, WAS AKEN INTO CUSTODY WITHOUT INCIDENT IN THE HALLWAY NEAR THE BATHROOM. HE PPEARED TO BE COMING FROM THE BATHROOM SHOWER BECAUSE HE WAS SOAKING WET, AKED AND HAD SOAP ON HIS BODY.

INVESTIGATOR PEARSON WAS ASSIGNED PROPERTY CUSTODIAN. FOR, WHAT, WHERE AND Y WHOM EACH PROPERTY WAS RECOVERED SEE HIS FOLLOW-UP REPORT FOR ADDITIONAL NFORMATION.

SPECIAL AGENT TOMASSO AND I INTERVIEWED BANKS WHILE SEATED AT THE KITCHEN ABLE. AFTER BEING ADVISED OF HIS RIGHTS, BANKS ADMITTED THAT ALL THE DRUGS, VER 290 GRAMS OF COCAINE, LOCATED IN THE APARTMENT WHERE USED AND SOLD BY HIM.

FOR DETAILS OF BANKS' INTERVIEW SEE SPECIAL AGENT TOMASSO'S FD 302.

BANKS WAS TRASPORTED TO THE NLVDC WHERE HE WAS BOOKED BY SGT. JACKS FOR RAFFICKING A CONTROLLED SUBSTANCE (COCAINE) HIGH LEVEL (OVER 28 GRAMS).

records bureau processed	ser no	detective bureau processed	ser no
supervisor approving	ser no	officer reporting CRESPO/WILSON	ser no 0750

CASE: 98011333 ----NORTH LAS VEGAS POLICE DEPARTMENT---- REF: ORIGINAL
DATE: 7/16/98 ----------POLICE REPORT---------- PAGE: 6
TIME: 15:42 ----------BOOKING PORTION---------- OF: 6

ame of arrestee: BANKS/LASHAWN LOWELL mf: 99069169 cs: 1258302

ex	race/ethnic	dt birth	age	hgt	wgt	hair	eyes	bld	cmp
?	B N BLACK	11/13/76	21	507	150	BLK	BRO	MED	DBR

lias-aka: COTTON/LASHAWN LOWELL | place of birth: -
lias-aka: | SAN DIEGO CA
lias-aka: | ssn: 559451618
lias-aka: | driv lic/st: 371890323776 NV

cars, marks,
tattoos, etc:
llness/injuries:

ddress (house no; apt no; street, city, state, zip) | phone number
404 HENRY DR APT D LAS VEGAS NV 98110 | 7024524457

next of kin name: CUBIE/BETTY relation: GRANDMOTHER
ext of kin address: 4770 E OWENS APT A107 phone: SAME
employer: UNEMPLOYED occupation: MAINTENANCE

ate/time of booking: 7/15/98 1741 | abno: 164286 |
lace of arrest: 1404 HENRY #D LV NV 89110 | arresting officer: | vehl
ate/time of arrest: 7/15/98 1415 | JACKS/EDWARD | YES
fficers present during booking: | transporting officer: | impd
ILLIAMS 1248/DAVID 1207 | JACKS/EDWARD | NO
ed ID:

o.	orig	charge	warrant/nrs	cts	fgm	bail	case num
1	PC	00782	453.3385	1	F	-NONE-	98011333
	PCN 70348757-01	TRAFFICKING C S COCAINE-28 GMS + (HIGH LEVEL)					

records bureau processed	ser no	detective bureau processed	ser no
supervisor approving	ser no	officer reporting CRESPO/WILSON	ser no 0750

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 7-16-98

Lashawn Lowell Banks, 1404 Henry Drive, Apartment D, Las Vegas, Nevada, was interviewed by Special Agent (SA) Richard F. Tomasso of the Federal Bureau of Investigation and Officer Wilson Crespo of the North Las Vegas Police Department Narcotics Unit.

Banks was advised of the identities of the interviewing agent and officer and that he (Banks) had been placed under arrest for possession of a controlled substance. Banks was orally advised of his rights by SA Tomasso and then shown an Advise of Rights form, which he read and signed after saying he understood his rights. Banks advised he intended to cooperate and would answer only the questions he wanted to answer.

He claimed to have lived in the apartment alone for approximately five months, paying approximately $445 per month rent. The power bills were in his name but the telephone bill was in the name of Vickie Hawthorne, who had no connection to his drug activity or the apartment.

Investigation on 7-15-98 at Las Vegas, Nevada
File # 245D-LV-25886 Date dictated 7-15-98
Officer Wilson Crespo, NLVPD and
by SA Richard F. Tomasso RFT:jgh

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaded to your agency

Banks was shown approximately four ounces of rock cocaine found in a shoe box on the kitchen counter. He admitted it was his "crack" and stated there was an additional three or four ounces of cocaine located in his bedroom closet. Banks claimed that he did not "cook up" the cocaine from powder into "rock" form, but usually had someone else cook it. He stated that he not only used the cocaine, but sells it as well.

Banks was asked to provide to combination to a safe located in the back bedroom. He replied with the numbers "75-35-69."

SA Tomasso inquired about Banks' criminal background and Banks replied that as a juvenile he was sentenced to a term in Elko, Nevada on a weapons charge and was released approximately three years ago. Banks claimed that he was a member of the Rolling 60's Gang in Las Vegas, Nevada, but kept to himself and did not run with the gang.

Banks explained that the Chevrolet Caprice parked out front was his vehicle and he did not own any other vehicle.

Banks was asked to furnish information regarding his supplier. At that point, Banks stated his supplier was like family and he did not wish to provided his/her identity or other information such as the pager number he used to reach him/her. Banks stated even if he did cooperate ordering cocaine from his suppliers, it would take approximately two weeks to obtain because they move at their own pace and on their own schedule. He advised that he could order six to seven ounces of "rock" cocaine at any one time but more than that would be an unusual order.

Banks was shown equipment, apparently used to cook powder cocaine into "rock" cocaine, which was found in the kitchen cupboard. Banks claimed that he just purchased the equipment but had never used it because he does not cook the cocaine and that it is done for him.

Banks further advised that after getting out of prison approximately three years ago, he worked at the Horseshoe Casino for a short time and odd jobs, such as lawn work, with friends. He admitted to selling drugs during this time and that the six thousand dollars found in his apartment was money he saved over the years from working at the Horseshoe and the odd jobs. He then admitted that approximately two thousand dollars of the money was from selling drugs.

Banks then advised that he would consider providing the identity of his suppliers if a deal could be made for him. SA Tomasso advised Banks that no promises could be made for his cooperation other than the fact that it would be made known to the prosecuting attorney and, eventually the courts, that he cooperated.

Banks was also advised that he would still have to go to jail and face charges for which he was being arrested. Banks advised that he would think about divulging the identity of his suppliers after consulting with his attorney as to whether or not it was worth his cooperation.

Banks was then asked about the three weapons located in his apartment. When asked about the .22 caliber Beretta found on the closet shelf, Banks claimed that the gun was inoperative. As to the .40 caliber Eagle found on the couch and the bullet proof vest, Banks claimed he purchased them both at a gun show about a year ago and that the gun was registered. He also advised that the .380 caliber Lorcin was bought

from some guy on the street for $50 about a year ago but was not registered. Banks also indicated that the people he purchased his drugs from were Spanish speaking African Americans and Hispanics. Banks did not know if they were Mexican, Cuban or neither.

Banks was asked to describe how he would work his drug deals with his suppliers and he stated that it was just a matter of collecting the money for the drugs he had in his house and bringing them approximately three thousand dollars for another seven ounces. He claimed that he would just page them, they would call and tell him where to meet, and make a quick exchange. That was all he knew about them. He added that he usually sold the "crack" on various street corners in greater Las Vegas.

Prior to concluding the interview, Banks was asked if any drugs were stored at other locations (such as his mother's residence). He replied in the negative. He also claimed that his mother is not aware of his drug activity.

Before Banks was transported to the North Las Vegas Detention Center, he signed a Permission to Search Vehicle form, which was presented to him by SA Mitchell S. Moe and witnessed by SA Richard F. Tomasso.

Banks was permitted to contact his girlfriend, Kimberly Hawthorne, to come and secure is apartment. He was given a copy of the search warrant and receipt for all items seized from his apartment. Banks was transported to the North Las Vegas Detention Center where he was booked on state charges for possession of a controlled substance. A Federal detainer was placed on him by SA Richard F. Tomasso for him to be picked

up the following day for processing at the United States Marshal's Office and for an appearance before the United States Magistrate on Federal drug charges.

Attached to this FD-302 is a criminal history printout for Lashawn Lowell Banks.


```
CASE: 98011333        ----NORTH LAS VEGAS POLICE DEPARTMENT---- REF:    69671
DATE:  7/19/98        ----------POLICE REPORT----------        PAGE:  1
TIME: 20:21           ----------INVESTIGATIVE PORTION----------  OF:  6
**********************************************************************************
----------------------------------INCIDENT FOLLOWUP-----------------------------------
 classification/additional information:                          ! gang related?
 SERVICE OF SEARCH WARRANT/PROPERTY REPORT                       !      NO
---------------------------------------------------------------------------------
 invest bureaus/units notified:
---------------------------------------------------------------------------------
 location of occurrence:          ! rpt. dist: OJ  neighborhood: XXX
 1404 HENRY #D                    ! OTHER JURIS    OTHER JURISDICTION
---------------------------------------------------------------------------------
 from:     date / time  ! to:     date / time  ! report:     date / time
       7/15/98 / 14:15  !     7/15/98 / 14:15  !          7/15/98 / 14:15
---------------------------------------------------------------------------------
 hate crime? NO    ! fingerprints? NO    !
---------------------------------------------------------------------------------
    routing? ! prosecute? ! prop report? ! vehl report? ! arrest rpt? ! attach?
     OTHER   !     YES    !     YES     !      NO       ! ADULT ONLY  !   YES
**********************************************************************************
----------------------------------METHOD OF OPERATION---------------------------------
 residential---type:                target:                security:

---------------------------------------------------------------------------------
 non-residtl---type:                target:                security:

---------------------------------------------------------------------------------
 entry----location:                          method:
  exit----location:                          method:
---------------------------------------------------------------------------------
   suspect actions:
   A.                    B.                    C.
   D.                    E.                    F.
   G.                    H.                    I.
**********************************************************************************
----------------------------------DISPOSITIONS----------------------------------------
[ ]-UNFOUNDED/NO CRIME--0 [ ]-SUBMITTED D.A.------5 [ ]-RECLASSIFY---------10
[ ]-JUVENILE------------1 [ ]-ADMIN. CLEARED------6 [ ]-VIC REFUSED PROS.--11
[ ]-NON DETECTIVE CLR---2 [ ]-EXCEPTIONALLY CLR---7 [ ]-AFFIDAVIT----------12
[ ]-DETECTIVE ARREST----3 [ ]-SCREEN CLEARED------8 [ ]-CA/DA DENIAL-------13
[ ]-SUBMITTED CITY ATTY-4 [ ]-NO CHGS FILED(NCF)--9 [ ]-OTHER--------------14
**********************************************************************************
-------------------------------------RECORDS------------------------------------------
 class code---ucr !  sid number  !        date  ser no !          date  ser no
                  !              ! entered             ! cleared
                  !              ! scope               !   scope
                  !              !                     !
---------------------------------------------------------------------------------
**********************************************************************************
---------------------------------------------------------------------------------
 records bureau processed      ser no ! detective bureau processed     ser no
                                      !
---------------------------------------------------------------------------------
 supervisor approving          ser no ! officer reporting              ser no
                                      ! PEARSON/DONALD                  0997
---------------------------------------------------------------------------------
```

CASE: 98011333 ----NORTH LAS VEGAS POLICE DEPARTMENT---- REF: 69671
DATE: 7/19/98 ----------POLICE REPORT---------- PAGE: 2
TIME: 20:21 ----------PROPERTY PORTION---------- OF: 6

no.	artcds	type--descriptive information on property------- / additional descriptive information----------	stolen value	recover value
001	FIREAR	E brd: DESERT EAGLE mod: / --- ------ ---- sze: ser: 96314132 / cal: 40 coll: BLK col2: own$: / SEMI-AUTOMATIC HANDGUN FOUND ON LIVINGROOM COUCH BY 608	-------	-------
002	CURREN	E brd: US mod: / --- ------ ---- sze: ser: / cal: coll: GRN col2: own$: / $95 IN MISC BILLS FOUND ON LIVINGROOM COUCH BY 608	-------	-------
003	FIREAR	E brd: LORCIN mod: / --- ------ ---- sze: ser: 374026 / cal: 380 coll: BLK col2: own$: / SEMI-AUTOMATIC HANDGUN FOUND IN MIDDLE NIGHTSTAND DRAWER IN S.W. BEDROOM BY 601	-------	-------
004	CONSUM	E brd: mod: / --- ------ ---- sze: ser: / cal: coll: col2: own$: / APPROX 4.4 OZ OF ROCK COCAINE FOUND ON S.W. BEDROOM CLOSET SHELF BY 601	-------	-------
005	FIREAR	E brd: BARETTA mod: / --- ------ ---- sze: ser: BER587551 / cal: 22 coll: BLK col2: own$: / SEMI-AUTOMATIC HANDGUN FOUND ON S.W. BEDROOM CLOSET SHELF BY 601	-------	-------
006	CURREN	E brd: US mod: / --- ------ ---- sze: ser: / cal: coll: GRN col2: own$: / $6000 CASH FOUND ON S.W. BEDROOM CLOSET SHELF BY 601	-------	-------

++ totals-------)

type: E-evidence; F-found; I-impounded; L-lost;
O-other; R-recovered; S-stolen; X-safekeeping

records bureau processed	ser no	detective bureau processed	ser no
supervisor approving	ser no	officer reporting	ser no
		PEARSON/DONALD	0997

CASE: 98011333 ----NORTH LAS VEGAS POLICE DEPARTMENT---- REF: 69671
DATE: 7/19/98 ----------POLICE REPORT---------- PAGE: 3
TIME: 20:21 ----------PROPERTY PORTION---------- OF: 6

no.	artcds	type--descriptive information on property------- / additional descriptive information----------	stolen value	recover value
007	FIREAR	E brd: mod: / --- ------ ---- sze: ser: / cal: coll: GRN col2: GLD own$: / MISC GUN AMUNITION & MAGAZINES FOUND IN S.W. BEDROOM NIGHTSTAND BY 601	-------	-------
008	MISC	E brd: INTERNATIONA mod: TYPE II-A / --- ------ ---- sze: ser: 87510 / cal: coll: BLU col2: own$: / BULLET-PROOF VEST FOUND S.W. BEDROOM BY 601	-------	-------
009	MISC	E brd: mod: / --- ------ ---- sze: ser: / cal: coll: col2: own$: / MISC PAPERWORK ADDRESSED TO LASHAWN BANKS AT 1404 HENRY #D LAS VEGAS, NEVADA 89110	-------	-------
010	MISC	E brd: mod: / --- ------ ---- sze: ser: / cal: coll: BLU col2: own$: / LVMPD GUN REGISTRATION CARD FOR PROPERTY ITEM #1 TO LASHAWN BANKS FOUND ON NIGHTSTAND IN S.W. BEDROOM BY 609	-------	-------
011	ELECTR	E brd: MOTOROLA mod: STARTAC 6000E / --- ------ ---- sze: ser: 572GXF0211 / cal: coll: GRY col2: own$: / CELL PHONE FOUND IN S.W. BEDROOM BY 601	-------	-------
012	CONSUM	E brd: mod: / --- ------ ---- sze: ser: / cal: coll: col2: own$: / APPROX 6 OZ OF ROCK COCAINE INSIDE SHOEBOX FOUND ON KITCHEN COUNTER BY 608	-------	-------

++ totals-------)

type: E-evidence; F-found; I-impounded; L-lost;
O-other; R-recovered; S-stolen; X-safekeeping

records bureau processed	ser no	detective bureau processed	ser no
supervisor approving	ser no	officer reporting	ser no
		PEARSON/DONALD	0997

CASE: 98011333 ----NORTH LAS VEGAS POLICE DEPARTMENT---- REF: 69671
DATE: 7/19/98 ----------POLICE REPORT---------- PAGE: 4
TIME: 20:21 ----------PROPERTY PORTION---------- OF: 6

no.	artcds	type	--descriptive information on property-------	stolen value	recover value
			additional descriptive information----------		
013	ELECTR	E	brd: UNICOMM mod:		
			size: ser:	-------	-------
			cal: coli: BLU col2: own#:		
			PAGER FOUND ON KITCHEN COUNTER BY 607		
014	MISC	E	brd: mod:		
			size: ser:	-------	-------
			cal: coli: col2: own#:		
			BEAKER & SCALE INSIDE BLUE BAG FOUND IN KITCHEN CABINET BY 603		
015	CONSUM	E	brd: mod:		
			size: ser:	-------	-------
			cal: coli: col2: own#:		
			APPROX 8 GRAMS OF ROCK COCAINE FOUND IN KITCHEN DRAWER BY 603		
016	MISC	E	brd: mod:		
			size: ser:	-------	-------
			cal: coli: col2: own#:		
			BABY FOOD JAR 1/4 FULL OF ROCK COCAINE FOUND IN KITCHEN DRAWER BY 603		
017	MISC	E	brd: mod:		
			size: ser:	- -----	-------
			cal: coli: col2: own#:		
			SCALE FOUND ON KITCHEN COUNTER BY 603		
018	MISC	E	brd: mod:		
			size: ser:	-------	-------
			cal: coli: WHI col2: own#:		
			PLATE WITH RAZOR BLADE & RESIDUE ON IT FOUND ON TOP OF MICROWAVE IN KITCHEN BY603		

++ totals-------)

type: E-evidence; F-found; I-impounded; L-lost;
O-other; R-recovered; S-stolen; X-safekeeping

records bureau processed	ser no	detective bureau processed	ser no
supervisor approving	ser no	officer reporting	ser no
		PEARSON/DONALD	0997

CASE: 98011333 ----NORTH LAS VEGAS POLICE DEPARTMENT---- REF: 69671
DATE: 7/19/98 ----------POLICE REPORT---------- PAGE: 5
TIME: 20:21 ----------PROPERTY PORTION---------- OF: 6

no.	artcds	type	--descriptive information on property-------	stolen value	recover value
			additional descriptive information----------		
019	MISC	E	brd: mod:		
			size: ser:	-------	-------
			cal: coli: col2: own#:		
			MISC PAPERWORK ADDRESSED TO LASHAWN BANKS AT 1404 HENRY #D LAS VEGAS, NEVADA 89110		
020	MISC	E	brd: mod:		
			size: ser:	-------	-------
			cal: coli: col2: own#:		
			FOUR MISC PHOTOS FOUND ON KITCHEN CABINET BY 608		

++ totals-------)

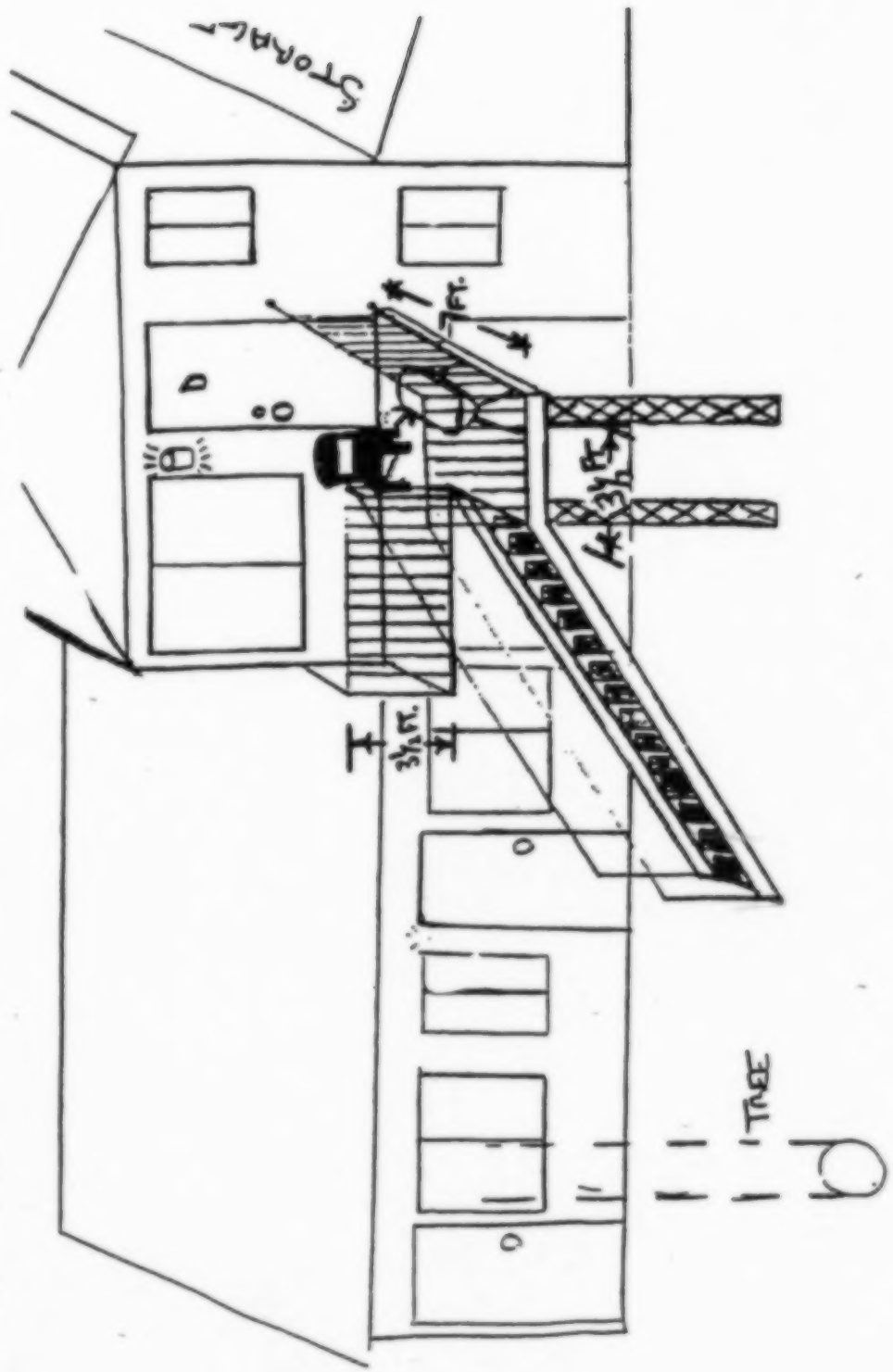
type: E-evidence; F-found; I-impounded; L-lost;
O-other; R-recovered; S-stolen; X-safekeeping

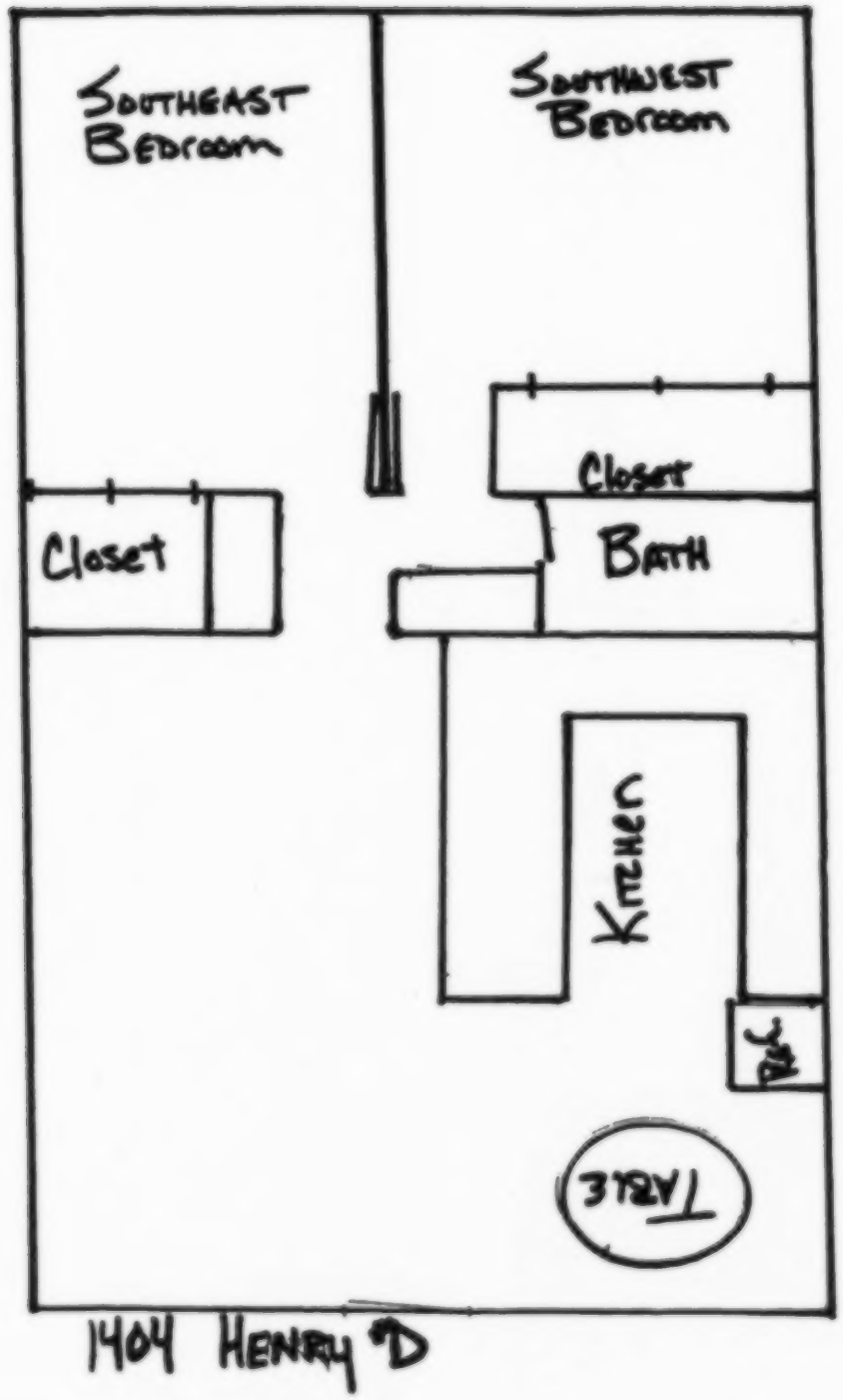
records bureau processed	ser no	detective bureau processed	ser no
supervisor approving	ser no	officer reporting	ser no
		PEARSON/DONALD	0997

CASE: 98011333 ----NORTH LAS VEGAS POLICE DEPARTMENT---- REF: 69671
DATE: 7/19/98 ----------POLICE REPORT---------- PAGE: 6
TIME: 20:21 ----------NARRATIVE PORTION---------- OF: 6

ON 7/15/98, AT 1415 HRS, THE NORTH LAS VEGAS POLICE DEPARTMENT (NLVPD) NARCOTICS UNIT SERVED A SEARCH WARRANT AT 1404 HENRY #D. I WAS ASSIGNED AS THE PROPERTY CUSTODIAN FOR THIS CASE. ITEMS WERE TAKEN FROM THE RESIDENCE FOR EVIDENCE. SEE PROPERTY LIST FOR DETAILS. AFTER TAKING INITIAL CUSTODY OF ALL EVIDENCE, I THEN TURNED IT ALL OVER TO SPECIAL AGENTS OF THE FEDERAL BUREAU OF INVESTIGATION.

records bureau processed	ser no	detective bureau processed	ser no
supervisor approving	ser no	officer reporting PEARSON/DONALD	ser no 0997





North Las Vegas Police Department Inventory/Property Sheet		Case #: 98-11333
Location: 1404 HENRY #D		Date/Time: 071598/1415
01	BLACK DESERT EAGLE .40 CALIBER SEMI-AUTOMATIC PISTOL SERIAL #96314132	
	W/MAGAZINE W/ 8 ROUNDS FOUND ON LIVING ROOM COUCH BY 608	
02	$95 IN US CURRENCY FOUND ON LIVINGROOM COUCH BY 608 (8-$10/3-$5)	
03	BLACK LORCIN .380 PISTOL SEMI-AUTOMATIC PISTOL SERIAL #374026 W/ 7 ROUNDS	
	MAGAZINE W/ LASER SIGHT ATTACHED FOUND IN MIDDLE DRAWER CABINET IN S/W	
	BEDROOM FOUND BY 601	
04	APPROX 4.4 OZ OF ROCK COCAINE FOUND ON SOUTHWEST BEDROOM CLOSET SHELF	
	BY 601	
05	BLACK BERETTA .22 SHORT SEMI-AUTOMATIC PISTOL SERIAL #BER587551 W/MAG	
	W/7 LIVE ROUNDS FOUND ON SOUTHWEST BEDROOM CLOSET SHELF BY 601	
06	$6000 IN US CURRENCY FOUND ON SOUTHWEST BEDROOM CLOSET SHELF BY 601	
07	MISCELLANEOUS AMMO & MAGS FOUND IN SOUTHWEST BEDROOM BY 601	
08	INTERNATIONAL ARMOR TYPE II A BULLET-PROOF VEST FOUND IN SOUTHWEST	
	BEDROOM BY 601 SERIAL #87510	
09	MISCELLANEOUS PAPERWORK ADDRESSED TO LASHAWN BANKS AT 1404 HENRY #D/601	
10	LVMPD GUN REGISTRATION CARD FOR THE DESERT EAGLE PISTOL/SHOWS REGISTERED	
	TO LASHAWN BANKS FOUND ON NIGHTSTAND IN SOUTHWEST BEDROOM BY 609	
11	GRAY MOTOROLA STARTAC 6000E SERIAL #572GXF0211 FOUND IN SOUTHWEST	
	BEDROOM BY 601	
12	6 OZ OF CRACK COCAINE IN SHOEBOX FOUND ON KITCHEN COUNTER BY 608	
13	BLUE UNICOMM PAGER FOUND ON KITCHEN COUNTER BY 607	
14	BEAKER & SCALE IN BLUE BAG FOUND IN KITCHEN CABINET BY 603	
15	APPROX 8 GRAMS OF ROCK COCAINE FOUND IN KITCHEN DRAWER BY 603	
16	BABY FOOD JAR 1/4 FULL OF ROCK COCAINE FOUND IN KITCHEN DRAWER BY 603	
17	SCALE FOUND ON KITCHEN COUNTER BY 603	
18	WHITE PLATE W/RAZOR BLADE & RESIDUE ON IT FOUND ON TOP OF MICROWAVE BY	
	603	
19	MISC PAPERWORK ADDRESSED TO LASHAWN BANKS AT 1404 HENRY #D	
20	FOUR MISC PHOTOS	

The above listed items were seized pursuant to the accompanying court ordered search warrant.

TIME STAMP	NORTH LAS VEGAS POLICE DEPARTMENT NARCOTICS DIVISION WARRANT SERVICE PLAN		
DATE: 07/15/98	CASE #98-11333	SCOUT:B. Walling 792	APPROVING SUPERVISOR:
LOCATION:1404 Henry #D Las Vegas, Nevada 89110			

LOCATION DESCRIPTION: 1404 Henry Drive apartment "D", City of Las Vegas, County of Clark, State of Nevada

more particularly described as a two story four-plex, tan in color with brown trim. Front door faces north.

FORTIFICATIONS/COUNTER SURVEILLANCE: Deadbolt lock

DRUG TYPE/EVIDENCE SOUGHT: COCAINE

PRIOR SERVICE: YES ☐ NO ✠ | CASE #:98-11333 | PRIOR INTEL AVAILABLE/ATTACHED?NO

SUSPECT/OCCUPANT INFO	PHYSICAL DESCRIPTION	SCOPE
1.BANKS/LASHAWN LOWELL	BMA, 507, 150, 11/13/78, 559-45-1618,	Yes
2.		Yes☐ No☐
3.		Yes☐ No☐
4.		Yes☐ No☐
5.		Yes☐ No☐

WEAPONS/ARMAMENTS: UNKNOWN

TOTAL PERSONS BELIEVED TO BE AT LOCATION:	MALE: 1	FEMALE: 1	CHILDREN: 1	ELDERLY:

DOGS: Yes ☐ No ✠ | NUMBER:——— | TYPE:——— | INSIDE ☐ | OUTSIDE ☐

UC OFFICER/CI INFORMATION	PHYSICAL DESCRIPTION
1.N/A	
2.N/A	

ARREST/TROUBLE SIGNAL | VISUAL:N/A | AUDIO:N/A

RADIO CHANNEL | PRIMARY CHANL 13 | SECONDARY 4 | U/C DEVICE FREQUENCY: N/A

PERSONNEL →

Order	Name	Unit No.	Assign.	Order	Approach	Entry
1.	TOMOASSO	607	SURVEILLANCE	1.	CORRADO	WALLING
2.	SGT. JACKS	309	E-2 /MP-5/SECURITY	2.	MOE	MELGAREJO
3.	CRESPO	600	E-3/MP-5/INTR	3.	PEARSON	JACKS
4.	MELGAREJO	601	E-1/MP-5/SEARCH	4.	WALLING	CRESPO
5.	WALLING	602	E-6/MP-5/SEARCH	5.	MELGAREJO	LEON
6.	CORRADO	603	FNT CONT/AR-15	6.	JACKS	PEARSON
7.	PEARSON	604	CONT/RAM/MP-5/PRI	7.	CRESPO	
8.	LEON	606	E-5/MP5/SEARCH	8.	LEON	
9.	MOE	609	SURVEILLANCE	9.		
10.				10.		

VEHICLE APPROACH/PARKING LOCATION:	EAST ON OWENS TO SANDHILL, SOUTH ON SANDHILL TO

SPINO, EAST ON SPINO TO HENRY, SOUTH ON HENRY, PARK IN FRONT OF 1408 IN LOT ON WEST/SIDE

FOOT APPROACH TO LOCATION:	SOUTH FROM VAN TO COURTYARD OF 1404 HENRY AND WESTBOUND

TO STAIRWAY.

PRIMARY ENTRY: FRONT DOOR	SECONDARY ENTRY:EAST/FRONT WINDOW

SURVEILLANCE OFFICERs	LOCATION
1. TOMASSO	HENRY DRIVE
2.	

CONTAINMENT OFFICERs	POSITION	ASSIGNMENT
1. CORRADO	FRONT OF LINE FROM VAN	FRONT CONTAINMENT
2.		

DISTRACTION/DISTRACTION DEVICE PLAN:	NONE

DOWNED OFFICER/PERSON PLAN:	OUT FRONT DOOR DOWN STAIRS TO COURTYARD TO VAN

MEDICAL/OTHER NOTIFICATIONS	LOCATION	CONTACT PERSON/CONTACT #
1.AMR	OWENS/PECOS	SGT. JACKS/
2.		

MISCELLANEOUS INFORMATION:	PEARSON WILL INITIALLY HAVE THE EYE ON THE TARGET HOUSE.

TOMASSO WILL ARRIVE TO RELIEVE PEARSON. PEARSON WILL MEET WITH RAID TEAM NEAR TARGET TO EXECUTE WARRANT.

POST SERVICE DETAILS

SCOUT: 07/14/98 WALLING/B 792	SCOUT UPDATES	SURVEILLANCE IN POSITION:	WARRANT SERVICE:

DISTRACTION DEVICE DEPLOYED: Yes ☐ No ☐	IF YES, DEVICE NO.:
FORCED ENTRY MADE: Yes ☐ No ☐	
PROPERTY DAMAGE: Yes ☐ No ☐	IF YES, PHOTOs TAKEN? Yes ☐ No ☐
STRUCTURE SECURED: Yes ☐ No ☐	

RELEASED TO NAME:	DOB:	SSN:

GUN REGISTRATION CARD
LAS VEGAS METROPOLITAN POLICE DEPARTMENT
LAS VEGAS, NEVADA

Date: 9MAY98

This certifies that on this date:

(Name) LASHAWN L. BANKS

(City) LAS VEGAS (State) NV

registered the weapon described on the reverse side of this card.

THIS CARD IS NOT AND SHALL NOT BE CONSTRUED AS A PERMIT TO CARRY SAID GUN CONCEALED. THIS CARD IS NOT TRANSFERRABLE TO ANY OTHER PERSON.

JERRY KELLER, Sheriff

Serial #: 96314132

Manufactured By: EMF/UZI

Caliber: 40SW Type: PISTOL Color: BLACK

Model: EAGLE 941RS Barrel Length: 4½"

Signature of Owner

C.C. Ord. 12.04.210 It shall be unlawful for any person to sell, give away, or permanently pass on to another person of any pistol, revolver or other firearm capable of being concealed unless the Transferor first registers, or causes the weapon to be registered to the new owner.

NARRATIVE SUMMARY

On July 7, 1998, Officers and Agents of the North Las Vegas Federal Drug Task Force conducted an undercover operation at 1404 Henry Drive, Apartment D, Las Vegas, Nevada, the residence of Lashawn Lowell Banks.

At the direction of the task force officers, a confidential informant purchased approximately seven point five grams (7.55 g) of "crack" cocaine from an individual inside of the aforementioned apartment who was known to the informant as "Shakes".

On July 15, 1998, Agents and Officers of the North Las Vegas Federal Drug Task Force executed a State search warrant at the Henry Drive address. Located at the apartment during the search was approximately 11 ounces of cocaine base ("crack"), 3 loaded hand guns, a bullet-proof vest, and $6,095 in U.S. Currency.

After being early advised of his rights, Banks admitted that the money, guns, and cocaine all belonged to him and that he not only sold the cocaine but used some of it for his personal consumption

Banks further advised that he would cooperate as to his admissions but declined to furnish the identify of his suppliers until he could determine if some sort of deal could be struck on his behalf through his attorney and the prosecuting attorney. Banks added that he hesitated to furnish his suppliers identity for fear of retaliation.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CR-S-98-269-JBR(RLH)

UNITED STATES OF AMERICA, PLAINTIFF

v.

LASHWN LOWELL BANKS, DEFENDANT

[Received: Jan. 11, 2000]

GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION TO SUPPRESS

COMES NOW the United States of America, by and through Kathryn E. Landreth, United States Attorney, and J. Walter Green, Assistant United States Attorney, and files a response to defendant's Motion to Suppress.

FACTS

On July 14, 1998, th North Las Vegas Police Department (NLVPD) was granted a search warrant authorizing a search. The premises to be searched was 1404 Henry Drive, Apartment "D", Las Vegas, Nevada. (App. A). The basis of the search warrant was to search for cocaine, cocaine paraphernalia and personal property which would tend to establish a possessory interest in the items seized. (App. A).

At 2:15 p.m. on July 15, 1998, NLVPD and the FBI arrived at the residence to serve the search warrant. The law enforcement personnel knocked and announced "police search warrant." After waiting a "reasonable

amount of time" a forced entry was made. (App. B). The defendant was found near the entrance to the bathroom. (App. B). The defendant was soaking wet, naked and had soap on his person. As a result of the search 290 grams of cocaine were recovered.

NLVPD Officer Will Crespo witnessed the oral advice of rights given to the defendant by FBI SA Richard Tomasso. (App. C). The defendant was then shown an advise of rights from which he read and signed. After signing the form the defendant orally acknowledged that he understood those rights. The defendant stated he would cooperate but would only answer questions which he wanted to answer. (App. C).

During the confession, the defendant admitted ownership of the cocaine, guns, money and paraphernalia found in his apartment as a result of the search. (App. C).

The defendant declined to give the names of his suppliers unless a "deal" benefitted him. Law enforcement informed the defendant they could not authorize an agreement at that time. Soon afterwards the interview ended. After the interview, the defendant was transported to the North Las Vegas Detention Center.

ARGUMENT

I. **No Violation of 18 U.S.C. § 3109 Occurred**

18 U.S.C. § 3109 is co-extensive with those protections of the Fourth Amendment. 18 U.S.C. § 3109 protects legitimate expectations of privacy, its protections and its sanctions. *United States v. Lockett*, 919 F.2d 585, 589-590 (9th Cir. 1990). The interest of safety, property and privacy are provided by the "knock and

announce" requirement of 18 U.S.C. § 3109. *United States v. Zermeno*, 66 F.3d 1058, 1062 (9th Cir. 1995).

The federal "knock and announce" statute, 18 U.S.C. § 3109, requires law enforcement officers executing a search warrant to identify themselves and state their purpose before forcibly entering a building. Absent exigent circumstances, forcible entry is justified only when there is an explicit refusal of admittance or a lapse of a significant amount of time. *United States v. Mendonsa*, 989 F.2d 366, 370 (9th Cir. 1993).

Section 3109 states:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

Implicit in this provision is the requirement that the officer wait a reasonable period of time after the announcement to give the occupants a chance to grant or refuse admittance. The amount of time that is reasonable depends upon the circumstances of each case. *United States v. McConney*, 728 F.2d 1195, 1206 (9th Cir.) (en banc), cert. denied, 469 U.S. 824 (1984).

A failure to knock and announce constitutes a violation of the Fourth Amendment. *United States v. Becker*, 23 F.3d 1537, 1541 (9th Cir. 1994).

In the instance the case law enforcement personnel did "knock and announce" their presence and waited a reasonable amount of time before making a forced entry into the apartment of the defendant. It is apparent the

defendant did not hear law enforcement announce their presence since the defendant was alone in the apartment taking a shower. Since a "lapse of a significant amount of time" passed after announcement and entry, no violation of 18 U.S.C. § 3109 occurred. *Mendonsa*, supra at 370.

II. Defendant's Confession was Voluntary

Defendant claims due to his intoxication and excitement his confession was not voluntary. Further, the defendant claims law enforcement personnel translated the amount of drugs seized to time in prison.

The defendant's confession was voluntary. The defendant's claim of intoxication, excitement and police statements do not rise to the level of involuntariness.

> A confession is voluntary if it is "'the product of a rational intellect and free will' . . . whether [or not] a confession is the product of physical intimidation or psychological pressure [or] a drug-[alcohol-] induced statement." *Townsend v. Sain*, 372 U.S. 293, 307, 83 S. Ct. 745, 754, 9 L. Ed. 2d 770 (1963) (quoting *Blackburn v. Alabama*, 361 U.S. 199, 208, 80 S. Ct. 274, 274-81, 4 L. Ed. 2d 242 (1960)); *Gladden v. Unsworth*, 396 F.2d 373, 380-81 (9th Cir. 1968).

Modeiros v. Shimoda, 889 F.2d 819, 822 (9th Cir. 1989).

The defendant may have been intoxicated or excited but he maintained a rational intellect and a free will. The defendant was able to acknowledge his rights and sign them after reading the advice of rights card.

He had the presence of mind to answer questions that only he wanted to answer. He also had the pres-

ence of mind to be concerned with the future consequences of his actions. Moreover, there was no indication that he was experiencing adverse effects from his alcohol use during the interview. *United States v. Kelley*, 953 F.2d 562, 565-66 (9th Cir. 1992) (confession involuntary where defendants began going through heroin withdrawal during his interview with police).

III. Defendant's Miranda Waiver Was Knowing, Intelligent & Voluntary

Defendant claims due to the alcohol use, excitement and law enforcement informing the defendant of possible prison time, the waiver was now knowing, intelligent or voluntary. The Government disagrees. Incriminating statements made by a defendant during a custodial interrogation are admissible if the defendant's waiver of his Miranda rights were voluntary and intelligent. *United States v. Andaverde*, 64 F.3d 1305, 1313 (9th Cir. 1995). Even the fact that a suspect is under the influence of drugs or medication will not necessarily render a confession involuntary if the suspect was not incapacitated. *United States v. George*, 987 F.2d 1428, 1430-31 (9th Cir. 1993); *United States v. Martin*, 781 F.2d 671, 673-74 (9th Cir. 1985). Additionally, the court must consider the totality of the circumstances, including the defendant's conduct, background, and experience. *Terrovona v. Kinchloe*, 912 F.2d 1176, 1179 (9th Cir. 1990).

As to the issue of incarceration, for the reasons previously stated, the Government continues to argue the defendant was not incapacitated. The defendant's conduct, background, and experience further supports the fact he made a knowing, intelligent, and voluntary waiver. The defendant executed a waiver of *Miranda*

rights before giving his confession. Moreover, the defendant has had numerous contacts with law enforcement where he has acquired knowledge of the consequences of any waiver of his rights. (App. C.).

Further, in *Colorado v. Connelly*, 479 U.S. 157 (1986), the Supreme Court made crystal clear that coercive police activity is a necessary predicate to the finding that a confession is not "voluntary" within the meaning of the due process clause. *Id.* at 170. Here, there is absolutely no evidence of police activity of any kind, coercive or otherwise. Unlike the situation in *Townsend v. Sain*, 373 U.S. 293 (1963), cited and discussed in *Connelly*, 479 U.S. at 165, any alcohol which the appellant may have consumed was not administered by the police and does not implicate any element of coercion.

Further, the defendant's excitement does not amount to coercion, nor does the fact the police truthfully informed the defendant he may face substantial time for his conduct.

The Government requests the defendant's motion to suppress be denied.

DATED this 6 day of January, 2000.

Respectfully submitted,

KATHRYN E. LANDRETH
United States Attorney

/s/ J. WALTER GREEN
J. WALTER GREEN
Assistant United States
Attorney

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the office of the United States Attorney for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on January 6th , 2000 she served a copy of the attached Government's Response to Defendant's Motion to Suppress by placing said copy in a postpaid envelope addressed to the person(s) hereinafter named, at the place(s) and address(es) stated below, which is/are the last known address(es), and by depositing said envelope and contents in th United States Mail at 701 East Bridger, Suite 600, Las Vegas, Nevada 89101-0030.

Addressee(s): Randall Roske, Esquire
511 South Tonopah Drive
Las Vegas, Nevada 89106

/s/ AYLIN ALEXANDER
AYLIN ALEXANDER

SEARCH WARRANT

STATE OF NEVADA

v.

COUNTY OF CLARK

The State of Nevada, to any Peace Officer in the County of Clark. Proof by Application and Affidavit for Search Warrant having been made before me by OFFICER W. CRESPO said Application and Affidavit for Search Warrant incorporated herein by reference, that there is probable cause to believe that certain property, namely:

1. An unknown quantity of cocaine.

2. The paraphernalia commonly associated with the ingestion and distribution of the controlled substance cocaine such as scales, packaging materials and "cut," grinders, customer and source lists, recordations of purchases and sales including "owe sheets" reflecting transactions in the controlled substance cocaine.

3. Limited items of personal property which would tend to establish a possessory interest in the items seized pursuant to this search warrant, such as personal identification, photographs, utility company receipts or addressed envelopes.

is presently located at:

1404 Henry Drive apartment "D", City of Las Vegas 89100, County of Clark, State of Nevada, more particularly described as a two story four-apartment,

tan in color with brown trim. The front door, which has the letter "D" on the door, is on the second floor and faces north.

and I am satisfied that there is probable cause to believe that said property is located as set forth above and that based upon the Application and Affidavit for Search Warrant there are sufficient grounds for the issuance of the Search Warrant.

* * * * *

* * * * *

* * * * *

* * * * *

* * * * *

You are hereby commanded to search forthwith said premises for said property, serving this Search Warrant at any time of the day at 1404 Henry Drive apartment "D", City of Las Vegas 89100, County of Clark, State of Nevada, more particularly described as a two story four-apartment, tan in color with brown trim. The front door, which has the letter "D" on the door, is on the second floor and faces north, as set forth in the Application and Affidavit for Search Warrant in support hereto, and if the property there to seize it, prepare a written inventory of the property seized and make a return for me within ten (10) days.

Dated this 8th day of July, 1998.

/s/ STEPHEN J. DAHL
STEPHEN J. DAHL
Justice of the Peace
North Las Vegas Township

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CR-S-98-269-JBR(RLH)

UNITED STATES OF AMERICA, PLAINTIFF

v.

LASHAWN LOWELL BANKS, DEFENDANT

. [Filed: Mar. 6, 2000]

MINUTES OF THE COURT
DATED: Mar. 6, 2000
2:37 pm to 4:00 p.m.

THE HONORABLE ROGER L. HUNT UNITED STATES MAGISTRATE JUDGE

DEPUTY CLERK KANDY CAPOZZI TAPE 00-3-14

COUNSEL FOR PLAINTIFF(S) WALTER GREEN, AUSA

COUNSEL FOR DEFENDANT(S) RANDALL ROSKE (Appointed)

MINUTES OF PROCEEDINGS: MOTION TO SUPPRESS (#48)

The defendant is present in custody.

The Government call WILSON CRESPO to the stand. Agent Crespo is sworn, examined, cross-examined,

further examined on redirect and re-cross, and then excused.

The Government calls WILSON CRESPO to the stand. Agent Crespo is sworn, examined, cross-examined, further examined on redirect and re-cross and then excused.

The Government call RICHARD TOMASSO to the stand. Agent Tomasso is sworn, examined, cross-examined and excused. Government Exhibit "1" and Defense Exhibits "A", "B" and "C" are marked and admitted into evidence.

GOVERNMENT RESTS.

Defense calls LASHAWN LOWELL BANKS to the stand. The defendant is sworn, examined, cross-examined and excused.

DEFENSE RESTS.

Closing arguments are heard.

The Motion to Suppress (#48) is taken under submission by the Court. A written ruling shall issue.

LANCE S. WILSON, CLERK
U.S. DISTRICT COURT

By: /s/ KANDY CAPOZZI
KANDY CAPOZZI
Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CR-S-98-269-JBR(RLH)

UNITED STATES OF AMERICA, PLAINTIFF

v.

LASHAWN LOWELL BANKS, DEFENDANTS

[Filed: Mar. 20, 2000]

OBJECTIONS TO THE REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE (MOTION TO SUPPRESS EVIDENCE)

COMES NOW, the Defendant, LASHAWN LOWELL BANKS, through his attorney, Randall J. Roske, Esquire, and respectfully submits his objections to the report and recommendation of the United States Magistrate Judge on the issues presented in the Motion to Suppress filed on behalf of the Defendant. These objections are supported by the attached memorandum of points and authorities.

DATED this March 20, 2002.

/s/ RANDALL J. ROSKE
RANDALL J. ROSKE, Esquire
511 South Tonopah Drive
Las Vegas, Nevada 89106-4026
Attorney for LASHAWN BANKS

MEMORANDUM OF POINTS AND AUTHORITIES

On March 6, 2000, Magistrate Judge Roger L. Hunt held an evidentiary hearing on the Defendant's Motion to Suppress Evidence. This motion sought suppression of the tangible and intangible fruits of the search conducted on Mr. BANK'S apartment on July 15, 1998. In the magistrate's rendition of the facts in the introduction, it erroneously states that "a search warrant was issued on July 14, 1998" (emphasis supplied). The search warrant int his case was in fact issued on July 8, 1998, by Justice of the Peace Stephen J. Dahl. This error was first presented in the government's response to the Defendant's motion. The second misstatement of fact is that the "law enforcement officers of the Las Vegas Metropolitan Police Department entered the Defendant's home at 1404 Henry Drive, Apartment D, Las Vegas, Nevada." (Emphasis supplied). Officer Wilson Crespo clearly identified himself as a member of the North Las Vegas Police Department. In the government's response the government stated "the North Las Vegas Police Department (NLVPD) was granted a search warrant . . ." (Emphasis supplied). It appears that the genesis for the error was caused by the magistrate's reliance on the erroneous location setforth in the government's response. There it identifies "1404 Henry Drive, Apartment D, Las Vegas, Nevada" as the place to be searched. (Emphasis supplied).

More troubling than the recitation of wrong dates for the search warrant's issuance, the law enforcement agency involved and correct city where the search was executed, is the Magistrate's analysis of the facts. No focus was given to the absence of any justification for utilizing force after a mere 15 to 20 seconds after the "knock and announce." Mr. BANKS testified that the

only thing he heard in the shower was the noise caused by the forcible entry into the apartment. There was absolutely no evidence of an explicit refusal of admittance adduced at the evidentiary hearing (which would justify a forcible entry). It is also logical and obvious that Mr. BANKS having been in the shower would need additional time to answer the door.

The Magistrate also ignored the coerciveness of the interrogation being concluded contemporaneously with the search of the apartment. Mr. BANKS related that as items were located he heard the officers announce how much time he was facing. The Magistrate talks about the totality of the circumstances as relevant to the analysis, but does not explain how or why the obvious excitement of having been thrown to the floor naked by hooded men armed with tactical grade weaponry did not present a significant element of coercion. It is necessary to note that the officers were white and that the Defendant is black. There is an unfortunate and shameful history in this country of abuse and even lynching of black people by white people wearing hoods. This too, adds to the totality of coerciveness prevailing the interrogation.

Mr. BANKS explained how the FBI agent interrogating him was playing the "good cop, bad cop" routine on him. Mr. BANKS' explanation of his use of alcohol and drugs that day and evening affected his ability to reason. Mr. BANKS expressed his fear that the officers would take him out of the apartment without proper clothing thereby using his public parade as a further tactic of humiliation.

Former Special Agent Dick Tomasso testified that Mr. BANKS was "very calm" during the interrogation. It is quite possible that what the former agent de-

scribed as being "very calm," despite having been placed in custody at gun point while law enforcement was ransacking his apartment for drugs and weapons, was evidence of drug/alcohol intoxication. In the Magistrate's discussion, he concludes that the officers in this case "complied with the know and announce requirement of [Title] 18 U.S.C. § 3109 and that the officers did not violated the Defendant's constitutional rights when they entered the Defendant's apartment." The Magistrate reasoned that the failure to answer the door in 15 to 50 seconds equate as a refusal of admittance (*Id.*). Factually, the instant case presents an excellent example why waiting a mere 15 to 20 seconds before concluding that there is a refusal of admittance, is an unjustifiably too brief a period of time. Here, Mr. BANKS was in the bathroom in a shower. Reasonably, how is one expected to get out of a shower and answer the front door in less than 20 seconds. The answer is that it is not reasonable logistically or under the Fourth Amendment. The Magistrate quotes *United States v. Phelps, 490 F.2d 644 at 647 (9th Cir. 1979)* for the proposition that "The Ninth Circuit has upheld the validity of searches where the delay was ten seconds or less." The *Phelps* case however noted that "There are no set rules as to the time an officer must wait before using force to enter a house; the answer will depend on the circumstances of each case. *United States v. Phelps, 490 F.2d 644 (9th Cir. 1974)* (emphasis supplied). The Magistrate goes on to point out that in *Phelps* the search was upheld where there was a 10 second or less delay coupled with the "hearing of movements inside" and the case *United States v. Allende, 486 F.2d 1351, 1353 (9th Cir. 1973)*, where the officers waited a mere ten seconds, but heard "scampering," Here, there was no testimony of any movement, noise or "scampering"

had been noticed. The facts that gave rise to concerns of destruction of evidence or flight are entirely absent from this record. There, therefore, exists no good reason for the resort to forcible entry after a mere 20 seconds (or 15 as testified by Officer Crespo).

The mere fact that the search warrant sought evidence involving drugs, does not mean that Fourth Amendment concerns disappear. The Magistrate provided no authority for his conclusion that "considering . . . that the warrant authorized a search . . . for cocaine . . . the lack of response . . . within fifteen to twenty seconds" justified the use of a battering ram to gain entry.

Turning now to the Magistrate's Report at page eight, he concludes that the "Defendant's actions indicated that the was capable of making reasoned decisions. The Magistrate comes to this conclusion after acknowledging "that intoxicating substances may impair an individual's senses, a decision to waive one's rights or confess is voluntary if it's the product of a rational intellect." The Magistrate is required to look to the totality of the circumstances in making a decision that a confession is or is not voluntary. Here, Mr. BANKS is in the shower intoxicated. He hears a bang so loud as to make him thing that the door has been shot out by some explosive. He stands naked, covered in suds, as hooded men armed to the teeth rush in. Mr. BANKS is pinned to the floor by an armed hooded man. Mr. BANKS does not know whether he is being robbed or arrested. All he knows is one false move could cost him his life. Naked and covered with suds he is taken to the kitchen area at gun point. He is then interrogated by a man in plain clothes who, in Mr. BANKS opinion, plays the role of a good cop in a good cop/bad

cop scenario. Mr. BANKS is distracted by the shouts of searching officers describing what they found and how much time he is facing. Mr. BANKS is confronted with drugs and interrogated as to whether the drugs are his and whether he's selling. Mr. BANKS signs forms he believes are consent forms to search his car, instead of *Miranda* right/waiver forms. Mr. BANKS makes various admissions, but when told he must give up his sources or spend his future in jail, invokes his Sixth Amendment right to counsel.

The Magistrate concludes that Mr. BANKS knowingly waived his rights based upon his ability to follow instructions and carry on conversation. The Magistrate also points to the fact that Mr. BANKS asked to have his girlfriend called to secure his apartment. Apparently, Mr. BANKS' rational decision not to resist overwhelming force (armed men in tactical assault gear) and to follow their instructions (at gun point), proves he was of sound mind. This author submits that at best, all of this shows his survival instincts were intact. The fact that his apartment had not functioning door was obvious to all and if he were to have any personal property left before a new door/door jam was installed, someone would have to be there. This realization again does not take a high degree of mental functioning.

The Magistrate ignores the facts showing the coerciveness of the setting. He ignores the Defendant's own testimony of impairment after ingesting crack cocaine, marijuana and hard liquor. Mr. BANKS did not, or could not, sleep the night before which also attests to his intoxication by a powerful stimulant, crack cocaine.

Lastly, the Magistrate concludes that Mr. BANKS' invocation of his Sixth Amendment right to counsel constituted no *Miranda* violation. This points out that since *Miranda v. Arizona, 384 U.S. 436 (1966)* was decided, no further questioning of a suspect can occur after he expresses a wish to consult with counsel. 384 U.S. at 474. To reach this conclusion that there was no *Miranda* violation, the Magistrate points to Ninth Circuit case dealing with "ambiguous or equivocal requests for an attorney" citing *United States v. Fouche, 833 F.2d 1284 (9th Cir. 1985)*. The problem from this author's point of view is that at some point during the interrogation, Mr. BANKS indicated wished to consult with counsel. That was not an equivocal invocation of the right to counsel. He did not further initiate interrogation. What is clear is that despite his unambiguous request to consult with counsel, is that interrogation continued. For this reason, his statements after this point must be suppressed. This is the teaching of the *Miranda* decision and the Magistrate is not free to alter its affect.

CONCLUSION

Wherefore, in light of the Fourth Amendment knock and announce violation, the tangible and intangible fruits of the poisonous tree. Additionally, Mr. BANKS post arrest statements were involuntary and should be suppressed under the Fifth and Sixth Amendments to the United States Constitution and the *Miranda* decision.

DATED this March 20, 2000.

/s/ RANDALL J. ROSKE
RANDALL J. ROSKE, Esquire
511 South Tonopah Drive
Las Vegas, Nevada 89106-4026
Attorney for LASHAWN BANKS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is a person of such age and discretion as to be competent to serve papers. That on March 20, 2002, she served a copy of the above and foregoing Objections to the Report and Recommendation of the United States Magistrate by placing said copy in a postpaid envelope, addressed to the person(s) hereinafter named, at the address(es) stated below, which is/are the last known address(es), and by depositing said envelope and contents in the United States mail at Las Vegas, Nevada or by hand delivery.

Addressee: United States Attorney
701 E. Bridger, Suite 300
Las Vegas, NV 89101

Helena Bozzo

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
Las Vegas, Nevada

DOCKET NO. CR-S-98-269-JBR(RLH)

UNITED STATES OF AMERICA, PLAINTIFF

v.

LASHAWN LOWELL BANKS, DEFENDANT

Las Vegas, Nevada
March 6, 2000
2:37 p.m.

HEARING ON DEFENDANT'S MOTION TO SUPPRESS

THE HONORABLE ROGER L. HUNT PRESIDING
UNITED STATES MAGISTRATE JUDGE

TRANSCRIPTION BY:

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Proceedings recorded by electronic sound recording, transcript produced by transcription service.

[2]

APPEARANCES:

FOR THE PLAINTIFF: WALTER GREEN
Assistant U.S. Attorney
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Las Vegas, Nevada 89101

FOR THE DEFENDANT: RANDALL J. ROSKE
516 South Sixth Street, #300
Las Vegas, Nevada 89101

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PROCEEDINGS BEGIN AT 2:37 P.M.

THE COURT: Please be seated.

THE CLERK: United States of America versus Lashawn Lowell Banks, Criminal-S-98-269-JBR(RLH). This is the time set for the hearing on the motion to suppress.

Counsel, please note your appearances for the record.

MR. GREEN: Good afternoon, sir, Walt Green for the United States.

MR. ROSKE: Your Honor, Randall Roske for Lashawn Banks.

THE COURT: Are we ready to proceed?

MR. GREEN: Yes, sir, we are.

MR. ROSKE: Defense ready, Your Honor.

THE COURT: All right. You may call your first witness, Mr. Green.

MR. GREEN: Yes, sir. We'd call Officer Will Crespo.

WILSON CRESPO, PLAINTIFF'S WITNESS, IS SWORN

THE CLERK: Thank you. You may be seated. Please state your name for the record and please spell your name.

THE WITNESS: Wilson Crespo, W-I-L-S-O-N C-R-E-S-P-0.

THE COURT: You may proceed.

MR. GREEN: Thank you, sir.

[4]

CRESPO — DIRECT

DIRECT EXAMINATION

BY MR. GREEN:

Q Officer Crespo, what do you do for a living?

A I'm employed with the North Las Vegas Police Department as a North Las Vegas narcotics officer.

Q Officer Crespo, on July 15th of 1998 were you on duty?

A Yes.

Q And did you come to the residence at 1404 Henry Drive, Apartment D, here in Las Vegas?

A Yes.

Q Whose apartment was that?

A Lashawn Banks.

Q Did you come upon a time later to see Lashawn Banks?

A Yes.

Q Can you identify him?

A Yes.

Q Could you tell us what he's wearing, please?

A He's the gentleman wearing the—looks like a gray jacket and brown clothing.

MR. GREEN: Sir, I'd ask that the record so reflect he's identified the defendant.

THE COURT: It will so reflect.

BY MR. GREEN:

Q You arrived there approximately 2:00 o'clock that afternoon, is that correct?

[5]

CRESPO—DIRECT

A Yes.

Q And why did you arrive there?

A We were serving a state search warrant.

Q What was your role in serving the search warrant?

A I was case agent.

Q When you began to make entry into the apartment, where were you?

A I was with the entry team.

Q Where was the entry team stationed?

A We were stationed outside of the apartment going up the stairs—the stairs.

Q Can you tell us step by step what you did once you got to the door, your group did?

A Yes. We knocked, we announced "police search warrant," and we waited.

Q How long did you wait?

A At least fifteen seconds.

Q Why did you wait so long? Have you had previous training in this area?

A Yes. I've been told by federal officers, special agents, that that gets challenged a lot in court, the knock and announce, and that if we were going to serve a search warrant and the possibilities are that it could possibly go federal, that we should take into account of knocking and announcing and waiting a reasonable amount of time before making entry.

[6]

CRESPO—DIRECT

Q Were you knocking in a loud fashion?

A Yes.

Q And what kind of tone were you using when you were yelling?

A A loud tone, authoritative tone, I guess.

Q Did you hear anything come back from the—from inside the apartment?

A No.

Q How did you make entry into the apartment?

A A forced entry was made.

Q How was that?

A One of the—one of the officers in the entry team used what we call a ram to force the door—force the door open.

Q Did you enter the apartment afterwards?

A Yes.

Q When did you first see the defendant?

A I saw him in the hallway near the bathroom area.

Q Where was—how was he dressed?

A He was naked.

Q Can you describe his body for us?

A Yeah. He was naked, he was wet, and it appeared that he had soap on his body.

Q Were you able to tell which direction he was coming from—

A It—

[7]

CRESPO—DIRECT

Q —in the apartment?

A It appeared to me that he was coming from the bathroom.

Q Did you give the defendant some instructions at this point?

A Yes. We yelled, police or search warrant, when we were entering the apartment, and as soon as we saw him, we yelled, get down on the ground, get down on the ground, and he got on the ground immediately.

Q Was he able to follow your instructions?

A Yes, he followed the instructions. He was taken into custody without incident.

Q Is this when you handcuffed the defendant?

A Yes. He was cuffed.

Q Did you place him anywhere in the apartment?

A Yes. We placed him at the table after he was taken into custody near the kitchen.

Q Did you witness his rights being read?

A Yes.

Q Did you watch him execute his rights waiver?

A Yes.

Q Who went over his rights with him?

A Special Agent Tomasso.

Q Based upon your observations, was the defendant able to understand what was going on?

A Yes.

[8]

CRESPO—CROSS

Q Was he able to follow your instructions?

A Yes.

Q Was he able to carry on a conversation?

A Yes.

Q Was he able to respond to questions?

A Yes.

Q And answers?

A Yes.

Q Did you smell any alcohol on the defendant?

A No.

Q Were you in close contact with the defendant so you would have been able to?

A Yes.

Q Did you find any empty liquor bottles in the apartment?

A No.

Q Did you do a search of the apartment?

A Yes, we did.

MR. GREEN: No further questions, sir.

THE COURT: You may cross-examine, Mr. Roske.

MR. ROSKE: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. ROSKE:

Q Now, Officer Crespo, isn't it true that you—you had no idea whether this matter was going to go federal or not at the time you executed the search warrant?

[9]

A No, that's not true.

Q You had an idea, correct?

A Yes.

Q And the idea was it would go federal?

A No, that's not true either.

Q Well, why don't you explain to me what was the status, then, at the time of the search?

A Okay. Yes. The status was that we only—at the time we had a buy into the apartment and we only had enough for a state search warrant, we didn't meet federal requirements at the time, but according to CI information, there was a possibility that we were going to find large quantities of rock cocaine that could

possibly meet federal requirements, and that's why we weren't sure if we were going to go federal or not at the time, but we knew the possibility was there.

Q So, quantity was the deciding factor?

A Not necessarily.

Q What other factors are there other than—

A There could—

Q —quantity of drugs seized?

A There could be many factors, weapons, guns, things like that, weapons, guns, and other drugs being found, other quantities of drugs or the types of drugs. So, just quantities alone wouldn't have been enough.

Q Now, when you effected entry, the defendant, you say, was

[10]

in the hall and dripping wet and apparently coming towards the door when—when you effected your entry with the battering ram?

A Yes.

Q And did he seem surprised to see the officers entering the apartment?

A They always—everyone always seems surprised. I would—I would—I would think so. I would be surprised if someone came in and had a gun.

Q And did you actually have your weapon drawn?

A Yes, we did.

Q And what kind of weapon do you use?

A MP-5 semiautomatic weapon.

Q And—

A Automatic, it goes also automatic, I should say.

Q Well, which—you can't tell by looking at it whether it's automatic or—

A No, it is. It can go either way, the way the trigger group is. You can—you can—it could go semiautomatic or it can go automatic.

Q Were you the only officer that was armed that did the entry?

A No. We all were armed.

Q Now, upon your entry, Mr. Banks was standing there in the hallway, I take it. It was obvious that he wasn't armed,

[11]

CRESPO— CROSS

right?

A Yes

Q But you ordered him to the ground. Now, did you at that point—well, let me ask you. Were you dressed in an undercover fashion, are you wearing SWAT uniforms? Were anybody hooded?

A Yes. We were hooded and we had our, what you refer to as SWAT uniforms.

Q Okay. And—

A And I'm taking that you're saying with the black and the vest that say, "Police," and the tactical gear, that that's what you're referring to.

Q All right. And everybody that made the forced entry were—they were attired in that garb?

A I wouldn't say everybody.

Q Well—

A Everybody in the—on the task force that's with the North Las Vegas Police Department. The FBI special agents may have worn their vests that said "FBI" on it.

Q Okay. But in the entry team, they were all dressed with the hoods and the—

A Yes. Most, not all, again.

Q Okay. How many officers entered the apartment there on the 15th of July?

A I couldn't give you an exact number. It was numerous, I [12] Know that.

CRESPO—CROSS

Q Would it be more than five?

A Yes.

Q Now were there any females in the team?

A Not that I recall. No.

Q Now Mr. Banks was, as you say, naked, and he was cuffed and then sat down at the—at the table. At what time did it come, or did the ever come a time when he was given some clothing?

A I think he was given something to cover up immediately, to cover himself up. I'm, positive that we didn't leave him there. We would never do anything like that, leave him there naked. That's not—

Q Did—

A —the way we practice. That's not what we practice. We just wouldn't do that.

Q All right. Did you have the opportunity to ask Mr. Banks to consent to have a test done on his urine or blood?

A No. Don't recall anything like that.

Q Okay. But you agree that you could have done that? I don't—I don't see why we would have asked him that.

A That's not—I don't know what—what the purpose would be behind that. So, no, I don't see why we would ask him that.

Q Well, you're aware that there's a state statute that proscribes people from being under the influence of controlled [13] substances?

A Yes, I'm aware of it.

Q That's a state felony?

A Yes, I'm aware of that.

Q That when you came into the apartment, you would agree that you—well, maybe not you personally, but, but members of the team conducted a search, correct?

A Yes.

Q And that search revealed quantities of what you believed to be cocaine?

A Yes. Large quantities. Yes.

Q So, it would certainly have risen into your mind the possibility that he might have used cocaine?

A No, that wasn't—that wasn't a consideration.

Q He—

A I can explain it to you, if you like, why that wasn't a consideration.

Q It wasn't a consideration?

A Yes.

Q Why wasn't it a consideration?

A the reason it wasn't a—

Q MR. GREEN: Sir, if I could, I would just object to this line of questioning. It's not relevant to the defendant's motions and issues that he brought up. I think his issues were excitement, alcohol, and no knock and announce, [14] so I don't know what basis this would have into the questioning of his motion.

THE COURT: Overruled. I'll hear what he has to say.

BY MR. ROSKE:

Q Could you answer the question, Officer?

A Yes. Again, the reason that wasn't done was we weren't charging him—we were charging him with what we found in the apartment, and we didn't—we were going federal with the large quantities of cocaine that were found, and that's what he was being charged with.

Q All right.

A So, that was never a consideration.

Q Do you—do you believe it's likely that people that sell drugs might use drugs?

A It could be—yeah, it could be likely, yes. It could be like—a lot of things could be likely where people sell drugs.

Q Okay. Well, was there anybody else developed as an occupant at the apartment?

A I'm not sure. I can't recall.

Q All right. When—

A I know we had a phone bill in someone else's name. I think there was a phone bill or some kind of bill that was found in someone else's name also in that apartment.

[15]

Q When you—is it safe to say that when you came in to conduct the search, you weren't looking for liquor bottles?

A Yeah, it's safe to say that.

Q In fact, your warrant didn't specify you to look for bottles that might have been alcohol bottles, right?

A Yes.

Q You wouldn't inventory them either because you're not looking at them, you wouldn't seize them?

A Yes, sir.

Q All right.

A You're right.

Q Now would you agree that normally a person who is subject to a forcible entry such as this case would be exited?

A Yes.

Q Would you have an adrenalin rush—

A Yes.

Q —In their body?

A Yes.

Q Would you agree that this would take them hopefully off guard?

A Right. Yes.

Q And—

A Temporarily off guard. I wouldn't go totally off guard for a long period, it's just temporarily off guard.

Q Well, wasn't it true that an interrogation occurred in [16] the apartment?

A I wouldn't call it an interrogation.

Q What would you call it?

A An interview.

Q Okay. And did you provide Mr. Banks with a statement to fill out in handwriting?

A Special Agent Tomasso did, yes.

Q And he did that?

A Yes, he did.

Q And he had good penmanship?

A I'm sorry, maybe I'm mistaking your question. I know I'm—can you repeat your question? Are you talking about—

Q Do you recall whether a voluntary statement was provided?

A Not a voluntary statement.

Q A blank form?

A No, no, not that. No. I was thinking the advisement of rights—

Q Oh, okay.

A —form. I apologize.

Q All right. And—but he wasn't provided with a voluntary statement to write out?

A No, he—no, he was not.

Q And if he had been provided with a voluntary statement to write out, if he had intoxication, that might have been evident in his handwriting?

[17]

MR. GREEN: Objection, sir, it's speculation. He's already said he didn't give a statement.

THE COURT: Sustained. I think we are getting into a very speculative area, counsel.

MR. ROSKE: All right.

BY MR. ROSKE:

Q But in this case, did you have a tape recorder with you to record the interview process?

A That's—that's not our common practice to do that.

Q Why isn't it your common practice?

A The reason a lot of that—the tape could become discovery, and a lot of times in a drug case we try to ask the defendants or the people that we arrest to give us information on their suppliers, and for their safety, that's one of the main reasons in the North Las Vegas Police Department we don't record.

Q Okay. So, if you—if you're to make a written statement, that's not discoverable, but if it's in a tape-recorded form, it is discoverable?

A No, I didn't say that. I didn't say that.

Q So, you have a written policy on that point?

A No. I say it's our common practice.

Q Oh. And—but you—would you agree if we had a tape recording of the interview process, we could hear the tone of voice that was used?

[18]

A Yes—yes—yes, that's true. You could.

Q You could hear the volume of the voice that was used?

A Yes.

Q If there were something coercive about the questioning process, that would have been revealed by a tape?

A I don't know. It all depends. It's—it's a lot of—

Q Well, wouldn't a tape have been the best evidence of what we said at that interview?

A Again, I'm taking the safety of the person—we take the safety of the person that we're interviewing into consideration when we do these interviews because we know a lot of these interviews go into other things that the people talk about. So as far as people they're going to give up, and that turns into their safety, so, no, that's the main reason we don't record.

Q But you do use the recording technique when you have somebody go in and make a buy, perhaps, have a wire on?

A Yeah. That's totally different. That's totally different.

Q Well, it's more important to have the recording of the buy than it is in the interview then?

A No, that's not the case. That's not—that's not what I'm saying at all.

Q Was Mr. Banks sweating?

A I couldn't tell, he was—just came out of the shower.

[19]

Q Did he appear nervous to you?

A No, not after—not during the interview. No.

Q Do you recall any officers telling him, well, look at this. That's going to be ten years right there?

A No, I don't recall that. I don't recall that.

Q You don't recall any effort to ascribe a sentence for amount of quantity during the search process while Mr. Banks was seated at the kitchen table?

A Can you rephrase your question? I'm—again, I'm confusing what—

Q Well, are you—

A —you're asking me is.

Q —familiar with the sentencing guidelines?

A I am somewhat familiar, yes.

Q Are you familiar with mandatory sentencing under federal statutes?

A I'm somewhat familiar, yes. I know there's—there are minimums. I couldn't give you the exact minimums—

Q All right.

A —on each, but I know there are minimums.

Q You understand that when you get to a certain quantity, then a certain quantity applies?

A Yes.

Q Applies to that—that defendant?

A Yes.

[20]

Q And you don't recall any discussion about that being made?

A There may have been some discussions on that being made by Special agent Tomasso. Yes.

Q Okay. And the fact that these quantities were being maybe translated by Agent Tomasso into time, do you recall any years that were mentioned?

A No, I don't.

Q Now no Breathalyzer was administered to Mr. Banks?

A No. We—we—we don't do that. We've never done that.

Q Would you agree that the police department has portable breath samplers? Testers?

A Not for the narcotics units. No.

Q All right. Could you have called a unit over that had one?

A Yes, I could have done that.

Q All right.

A But we don't do that, so that's why we didn't do it.

Q Okay. You don't do that. Now you didn't obviously do any field sobriety test either, did you, at the—at the apartment?

Q There was no need for it. He wasn't driving drunk or anything, so , we didn't feel the need. That's the only time that we do field sobriety tests in our department is if [21] they're driving drunk.

A Well, is it safe to say that you had no idea what Mr. Banks had ingested prior to your making entry into the apartment?

Q Oh, yeah, it's safe to say that. I would never know that. No. I wouldn't know what anyone has ever—has ingested when I go into their apartments.

Q And it's safe to say that you would have no idea how he felt during the process of this investigation when he was in the—

A What do you mean, how he—

Q —in the kitchen?

A What do you mean how he felt, like his feelings on—I don't understand.

Q Intimidated or not?

A I don't know how he felt. I don't—couldn't tell you what he felt.

Q Now, you were in the apartment for some time, weren't you, with Mr. Banks doing the search?

A Yes, sir, we were.

Q And that probably totaled, what, forty-five minutes?

A That's a good approximation, may be a good approximation.

Q Was Mr. Banks afforded an opportunity to call counsel?

A No, he never asked for it.

Q Would you agree that one of the efforts that was made [22] during the interrogation was to identify his supplier?

A Yes. That's our common practice.

Q And, in fact, that was what, I guess, your concern was about the—this thing becoming part of discovery as to what people he wanted to give up?

A Yes.

Q Now, did you make notes of what was being said, or did somebody else make notes?

A There's is a possibility that Special Agent Tomasso did.

Q Okay. But then you didn't personally take—

A No, I did not

Q —any rough notes?

A No, I did not.

Q Did you have a chance to review Agent Tomasso's 302?

A Yes, I have.

Q Okay. And did you rely on that to refresh your recollection prior to testifying here today?

A Yes.

MR. ROSKE: Pass the witness.

THE COURT: Any redirect?

MR. GREEN: Yes, sir. Just very briefly.

REDIRECT EXAMINATION

BY MR. GREEN:

Q Was the shower on or off by the time you made entry into the apartment?

[23]

A The shower was off.

Q Now did you—after you restrained the defendant, did you find some guns in the apartment?

A Yes. Guns were found in the apartment.

Q As you were making entryway into the apartment, were people identifying themselves the entire time?

A Yes. Yes. People were identifying—the team was identifying itself.

Q Did you say it many times where—

A Yeah. We say it numerous times as we go in. It's continuous until the—until the entire place is secure. We continue to yell, " police, search warrant, " so, if anyone who doesn't hear us, will hear us as we go in.

Q Do you have any reason or any indications that the defendant was drunk at the time?

A No.

Q And can you describe his demeanor once the interview process began?

A His demeanor was good. He spoke well, his speech wasn't slurred, which would give me any indication that he was drunk, or maybe under the influence of any controlled substance or any substance whatsoever. He spoke clearly. Again, his speech wasn't slurred, his eyes weren't red, his—they weren't droopy or anything to give me any indication that he was either drunk or under the influence of any type of [24] controlled substance.

Q Did you transport the defendant to the jail?

A No, I don't recall transporting him.

Q dO you know if they have procedures about anyone who appears intoxicated?

A Yes. Our jail, if someone is too intoxicated, they won't take 'em.

Q And do you know if that happened to the defendant that night?

A He was—he was arrested. He was booked.

Q So that—

A He was not—he was not released.

Q Thank you.

MR. GREEN: No further questions, sir.

RECROSS EXAMINATION

BY MR. ROSKE:

Q Now, Officer Crespo, if I'm to understand your redirect, if somebody is, say, arrested for public drunkenness, they don't get booked in the jail?

A I don't—no, not for public drunkenness, no. It's a safety thing. And under his situation, he wasn't driving drunk—

Q Well, I don't know he wasn't driving—

A —If that was the case.

Q —drunk, but you're saying that if he got to the jail [25] and he was intoxicated, that they wouldn't accept him?

A No, they wouldn't accept him. If he was driving drunk, yes, he would be accepted.

Q And are you saying that if he's arrested for drugs and he doesn't grossly be—if he's not falling down intoxicated, then they have to take him?

A Yes, they have to take him.

MR. ROSKE: Pass the witness.

MR. GREEN: No further questions, sir. Thank you.

THE COURT: Is this witness excused?

MR. GREEN: Yes, sir, he is.

THE COURT: You may step down, Officer. Thank you.

MR. GREEN: We'd call Special Agent Dick Tomasso, sir.

RICHARD TOMASSO, PLAINTIFF'S WITNESS, IS SWORN

THE CLERK: Thank you. You may be seated. Please state your name for the record and please spell your name.

THE WITNESS: It's Richard Tomasso, T-O-M-A-S-S-O.

DIRECT EXAMINATION

BY MR. GREEN:

Q Mr. Tomasso, have you recently retired from the FBI?

A Yes, sir, I did.

Q And when was your retirement to take effect?

A It took effect January 31st of this year, 2000.

Q Mr. Tomasso, were you still on duty on July 15th of '98?

[26]

A Yes, sir, I was.

Q Did you have an occasion to execute a search warrant at 1404 Henry Drive, Apartment D, here in Las Vegas?

A Yes, sir.

Q What was your role before the entry of that apartment was made?

A I think I was on surveillance of the apartment until the entry team rolled up, and then my duty was to cover the exit windows as they made entry.

Q You took position right outside the apartment, is that correct, Mr. Tomasso?

A Outside—the back and side. Yes, sir.

Q Did you hear the team try to make entry into the apartment by knock and announce?

A Yes, sir, I did.

Q Approximately how long, to the best of your recollection, was it before you heard them make forced entry?

A Well, I would say pretty close to about, I think, twenty seconds, maybe.

Q Is that unusual for it to be that long?

A I thought so. I was out watching the windows, and I thought he had—they were waiting so long that he had a chance to escape to me where I was.

Q When did you first make entry into the apartment?

A Oh, I followed 'em in, maybe seconds, half a minute to a [27] minute after they got in and I heard the clear sign.

Q Did you see Mr. Banks?

A Yes, I did.

Q When was the first time you saw him?

A He was standing right in the kitchen area with, I think, a towel wrapped around him and handcuffs.

Q Did you have him placed somewhere?

A I had him moved to the kitchen and placed in a chair.

Q Was he able to follow instructions at that point?

A Oh, yes, sir.

Q Did you ask him any questions, then, Mr. Tomasso?

A Well, I—myself and officer Crespo a couple minutes later went over and began to interview him.

Q Did you question him about, or ask him about if he wanted to waive his rights?

A Oh. Oh, yes sir. I—the very first thing I did when I approached the kitchen table with Officer Crespo was to advise him of his rights.

Q Did you do this orally, or by a statement?

A I did it both. Actually, I orally advised him and then I took out an advice of rights form which I gave to him to read and went along with it when I gave it to him.

Q Did you sign this form?

A Yes, sir, I did.

Q Did you witness Lashawn Banks sign this form?

[28]

A Yes, sir, I did.

MR.GREEN: Sir, if I could approach?

THE COURT: You may.

MR.GREEN: Sir, this is previously marked as Government Exhibit 25, which is a trial government exhibit. I'll have it remarked as 1 for the motion hearing.

THE COURT: So, for this hearing, it's Exhibit 1?

MR. GREEN: Yes, sir. I'd ask, absent any objection, it be admitted into the record at this time, sir.

MR. ROSKE: No objection.

BY MR. GREEN:

Q Could you tell us what that is, please?

THE COURT: It will be admitted.

(Plantiff's Exhibit No. 1 admitted)

MR. GREEN: Thank you, sir.

BY MR. GREEN:

Q Could you please tell us what that is?

A This is the advice of rights form which I presented to Mr. Banks for him to read.

Q Is your signature on there?

A Yes, sir, it is.

Q Is Mr. Banks?

A Yes, sir.

Q Is anybody else's on there, Mr. Tomasso?

A Officer Crespo who conducted the interview with me.

[29]

Q Can you describe for us how you go about advising someone of their rights?

A After I orally advise him, I identify myself and tell him who I am and why we're there, and identify myself. Then, I orally advise him of his rights and tell him I intend to—I'd like to interview him, but before I start I ask him to read the advice of rights form and make sure he understands it and asks if he signs it, if he would like

to sign it that he understood it. Sometimes, they say yes, sometimes they say no. In my thirty—one years with the Bureau, I usually go over it with 'em to make sure they understand it.

Q Well, do you read along with them? Is that how you do it?

A For the most part, I usually do. I can't remember a time I don't actually cover it. Because I don't have it committed to memory, I just read along with them.

Q Is that your standard practice to do that?

A Yes, sir, it is.

Q To your memory, did the defendant acknowledge these rights?

A Yes, sir, he did. In fact, at the part—at the part on the advice of rights form where it says:

> "If you decide to answer questions now without a lawyer present, you have the right to stop answering at any time."

[30]

At that point he stopped me and said, well, I would like to cooperate and I will answer some of your questions, but there are some that I don't—really would not like to answer. So, I said, that's fine, and so I know that he understood what I was saying at that point.

Q What was his demeanor like during the interview?

A Very calm, actually. It was very—it seemed like very calm, informal, not agitated or anything.

Q Was he able to follow your instructions?

A Well, he appeared to follow them fine.

Q Was he able to answer your questions

A Yes, sir.

Q And he made such request?

A Well, he would ask me questions back and forth. We would exchange questions. Yeah.

Q Near the end of the interview, was he able to make a request upon you?

A Oh, yes, sir. He asked if he could contact a girlfriend of his to come over and stay in the apartment while he went off to the detention center because he was—wanted it secured, and we told him, fine.

Q Did the defendant ever slur any of his words, give you any indications that he was intoxicated or under the influence of drugs?

A Oh, no, sir.

[31]

Q Did you ever—to your memory, did you ever say anything to the defendant concerning the amount of drugs and what may happen to the defendant?

A Well, what happened was, see, this was a—began as a state case, but in speaking to Officer Crespo, I knew that it could possibly be taken through the federal system depending on what was found in the apartment, and so I told him that this case could possibly go

through the federal court system rather than the state, and if it did, he—in order to secure his cooperation, we told him we would like him to cooperate because in the federal system it's a little bit tougher on the drug dealers than it is in a state system.

Q And what was his reply?

A The first response was, well, what kind of deal can you cut me? I think he asked that. What were we talking about for a deal? And when I explained to him, well, it wasn't up to me, that it would still be up to the judge, really, but it would be made known to the prosecutor and the court, his response at that point was, well, maybe I'd better talk to an attorney before I strike a deal. That's it in a nutshell without me referring to my report.

Q Right. And did you tell him what was going to happen to him that day regardless of whether he cooperated or not?

A Oh, no, no, yeah, of course. I told him that regardless if he cooperated on the spot or not, he was going to jail, I [32] mean, there was—he wasn't getting out of jail.

Q Thank you.

MR. GREEN: No further questions, sir.

THE COURT: You may cross-examine.

CROSS-EXAMINATION

BY MR. ROSKE:

Q Agent Tomasso, you were dressed in street clothes that day on the 15th of July, 1998?

A Yeah. Street clothes, you mean, just a sport shirt, jeans, type of thing or a suit?

Q Right. Or were you wearing a SWAT or FBI jacket or, what were you wearing?

A I was dressed in—huh. You know, I'll be honest with you, I don't know exactly if I was wearing jeans or sport pants or what, but I did have an FBI vest on, a protective vest. I would always wear that.

Q Was it a bulletproof vest?

A Oh, yes, sir. FBI bulletproof vest.

Q Okay. And the officers that went into the apartment, they were—they were dressed in police garb, correct?

A I'm sure they were.

Q And hooded?

A Hooded. Yes, sir.

Q And did there ever come a time during the process that the hoods were removed?

[33]

A Not that I recall.

Q So, you recall that Officer Crespo had his hood on or off during the—

A I'm going to say that it was on. I never remember him taking off a hood in front of a defendant or subject at the time. I'm almost sure that it was on. If he took it off, I don't recall him taking it off. Let me just say that.

Q But you weren't wearing a hood?

A Oh, no, sir.

Q And now this was a joint task force investigation, correct?

A Yes, sir.

Q And one of the things that can happen in a joint task force case is it can go state or it can go fed, right?

A Yes, sir.

Q Prosecution-wise?

A Yes, sir.

Q And you guys apparently have your criteria for which way it will go?

A Yes, sir.

Q And depending upon whether guns were found, you could go federal with it?

A Well, yeah. I think there's other circumstances, sir, depending on how much drugs were found, depending on the criminal record of the defendant. There's—the United States [34] Attorney takes all that

into consideration. And it's their call, it's not mine. I mean, I may want to take something federal, I still need to consult the United States Attorney's Office—

Q Well, right—

A —and it's up to them.

Q —I mean, if they—if they decline a federal prosecution 'cause you've got two grams of crack, they're not interested in that, right?

A If they say no, then it's no.

Q All right. But in this case, they said, yes, right?

A Yes, sir.

Q Okay. And when you were there, you knew that this was a potential federal matter, correct?

A I felt it was. Yes, sir.

Q And your—when you went through training at the academy, you learned about various investigative techniques?

A Yes, sir.

Q One of the investigative techniques for taking statements is to offer witnesses blank forms and a pen and write it out, right?

A Signed statement?

Q Right.

A It's done on some occasions, yes, sir.

Q Well, would you agree with me that if it were in the [35] defendant's handwriting, it would be—and he were allowed to read it over and make corrections, that'd be a pretty solid record of what was said by the defendant?

A Would I agree to that? It depends, sir. I've given paper and pencil to defendants in the past and they sit there and what starts out to be a signed statement or confession turns out to be self serving statements denying guilt and excuses and alibis. So, what—what do you mean?

Q Well, I mean, it certainly would—

A I mean, I wouldn't sit there—

Q —I mean, you—it may not be subjectively, in your mind, accurate, but it would certainly be an excellent record of what the defendant actually said, whether it was denial or—

A Oh, okay. Yes, sir.

Q —you know, refuting, or—

A I see. I see what you are saying. Yes, sir.

Q —quibbling about whether he was it or not, right?

A Yeah. I see what you are saying. Yes, sir.

Q Okay. But you didn't do that here?

A No, sir.

Q And you have tape recorders at the FBI, right?

A Yes, sir.

Q You do investigations, undercover investigations, use tapes all the time to get accurate statements about what [36] people say, correct?

A Yes, sir.

Q And it's your policy not to record interrogations, correct?

A It's not my policy, it's not Dick Tomasso's policy, sir, it's the policy of the Federal Bureau of Investigation.

Q Okay. Can you identify why it wouldn't be good to have the best evidence of what was said for, say a suppression hearing?

A Well, sir, it depends. If I—I didn't have a tape recorder that day, but had I had a tape recorder and attempted to take it, I would need permission, actually, to do it. Secondly, this wasn't a very conducive situation. There were, maybe, eight or nine other people searching an apartment, there were loud voices talking, hollering going back and forth, so you get a lot of extra noises on the tape recorder. It's just not an ideal situation.

If I was going to tape record, I felt that something needed to be tape recorded, I would probably try to do it under more controlled circumstances, back in an office, maybe after a client talked to his attorney and decided, yes, that would be fine, gotten permission from the FBI. There are just a lot of circumstances to consider before you just whip out a tape recorder and start recording whatever he has to say, plus I didn't

know at the time if he was going to cooperate, wasn't [37] going to cooperate, was going to lie, not lie. There's just a quite bit, sir.

Q Well, it's your recollection, though, that—that he was there, he was in a towel, he was in the apartment while the search was going on. As you say, there's loud voices, people shouting out they found drugs?

A Yes, sir.

Q People shouting out they found guns?

A Yes, sir.

Q A lot of excitement going on there?

A Not excitement so much as the voices would be picked up on a recorder. That's the point I was making, not so much—

Q Well, okay, but is it safe to say that if you—

A There was other talking going on besides—

Q —wanted to , you could have him removed to some other quiet location for interrogation?

A Keep in mind, at this time it's still a state case, number one; I still don't have permission to take it through the federal system. We were following their rules and their regulations for taking him to a state detention center. And could we have removed him? Not necessarily during the search. We wanted him there to see what was taken.

Q Why did you want to see—have him see the—what was seized?

A Just so that he would see the receipt that we were going [38] to leave him for—and he couldn't say that wasn't taken from my apartment, for later on down the line.

Q So, was it ever explained to him that because a gun was found, he'd be facing mandatory time?

A No, I don't think I knew that to explain that. I was considering, basically, the drugs is what I was thinking about.

Q Well, do you believe that—do you understand there's sentencing guidelines—

A Yes, sir.

Q —and federal statutes regarding doing drug transactions with firearms?

A I know there are, sir, but I'm not so versed as to know if the guns are in the home, if it counts as being used in a transaction or on the person while he is making a sale. I think there's some—I think there may be some differences. So, I really wasn't aware enough of where we stood on it. I'm not an attorney.

Q But you would agree with me that the purpose, one of the purposes, at least, of having Mr. Banks present there during the search would be for him to see that the drugs were found, right?

A Actually, our main purpose was to solicit his cooperation. We wanted his supplier, basically.

Q Right. And if he saw that the hook was in the fish, so [39] to speak, that was your maximum moment of, perhaps, getting his tongue loosened.

A Yes, sir.

Q —correct?

A Yes, sir.

Q Now, you recall in your direct, you state that there was this interplay between yourself and Mr. Banks about whether he would cooperate, correct?

A Yes, sir.

Q In fact, at one point he said he would answer some questions and others he would not?

A Yes, sir.

Q And at one point he asked for a lawyer, right?

A No. I don't—he didn't—not while the interview —while we were interviewing him. If he had asked for a lawyer, we would have stopped interviewing him. He said before he would strike any deal to tell us who his supplier was, he would talk to—he would see if his—would talk to an attorney to see if it would be worth his while to give up his supplier. That's all he said.

Q Well, we're in the process of this interrogation and to determine whether he would cooperate, and he brings up what you say, well, I can't bind, you know, hey, I'm not the U.S. attorney, I'm not the judge—

A Yes, sir.

[40]

Q —but we can see what we can do, we'll let the court know about your cooperation. And then he says, well, maybe I need a lawyer?

A No, he didn't – it didn't come up like that. If he had said those words, maybe I need a lawyer, the interview would have terminated. It wasn't that context.

Q Well—

A I wrote down on my report how it came up.

Q Well, could you help me out here? At what point did it come up?

THE COURT: What come up?

MR. ROSKE: The lawyer.

THE COURT: I would—

THE COURT: Counsel, I thought he testified that a lawyer didn't come up. Did I misunderstand?

MR. ROSKE: It never came up during the—

THE WITNESS: No, sir. Your honor, he did say when asking me if—what kind of a deal could I make him if he cooperated—

THE COURT: Oh, okay.

THE WITNESS: —and gave us his—

THE COURT: I'm sorry.

THE WITNESS: —the information. At that point, he says, maybe I'll decide to cooperate and give you the identity of my suppliers, or something to that effect, after I talk to [41] an attorney to see what I can get out of it, or something like that.

And when did it come up in the conversation?

BY MR. ROSKE:

Q Yes.

A I mean, in the interrogation?

Q Right.

A Half to three quarters of the way through it, probably.

Q All right. But whatever he said didn't—didn't come into your mind that he was invoking his privilege to consult a lawyer?

A No, sir, that's right. I did not understand that.

Q He was speaking rhetorically, then, in your mind, well, maybe I should talk to a lawyer, is that right?

A No. It was, before I decide to cooperate and name my suppliers, I'll see what kind of a deal I could get through—once I consult an attorney. He needed an attorney to see what kind of a deal he could get him to give us his suppliers. He did not want to talk about his suppliers until he talked to an attorney about a deal; however, he did say he would talk to us about his own culpability.

Q So, in your mind, it was sort of a limited invocation of his—

A Well—

Q —right to consult with a lawyer about cutting a deal, [42] but not about incriminating himself?

A That's—yes, sir.

Q Okay. As I understand it, there was at least for about forty-five minutes, a lot of activity going on around what the officers were finding, like weapons, you recall there were weapons seized there, right?

A Yes, sir.

Q You recall that there was quantities of drugs located?

A Yes, sir.

Q. This was not just one of those deals where you go and you come back empty handed, this was a case that was going to be prosecuted, at least in the state system, correct?

A Yes, sir.

Q And you're saying that when this occurred Mr. Banks seemed cool as a cucumber, or calm, or what was the word you said?

A He was very calm. He was very, very—I don't know how to say it, very calm. Yes.

Q Here's this man, he's got armed police in his—in his apartment uncovering evidence that could put him

in the pokey for years, and in face of that he's showing no excitement to you?

A No, sir, he didn't. He was—in fact, he was very congenial about the whole thing. The whole—the interview was a very congenial interview. It was—I don't [43] know how else to explain it. I just can't think of the English word at the moment to better express it.

Q All right. Now, just so I'm clear on the policy not to record the interrogation, that's—that's agency policy or that was the North Las Vegas's policy?

A That's—that's agency policy.

Q Okay. Is that in the Manual of Investigative and Operational Guidelines?

A I'm going to guess that it is. I never read it, I was just—I know the policy just by attending, you know, classes and instructions.

Q Okay. You don't know where in that manual it is?

A Oh, no, sir.

Q But you're aware that it's there?

A I'm 99 percent sure that it's there.

Q All right. But if we had that manual produced, you could find it?

A Eventually.

Q All right. And you were not aware that Mr. Banks was given any field sobriety test at the scene?

A Was I aware that he was given one?

Q He wasn't given one, was he, that you saw?

A Oh, no. No.

Q He wasn't required to give a urine specimen about whether he had used drugs?

[44]

A No, sir. Not while I was present.

Q Okay. And you weren't the case agent, so, it wasn't your call, right?

A You know, as an FBI agent, I would have had some of the call on it along with Officer Crespo who was the case agent on the state case. I mean, he would have discussed it with me. But, basically, it was still the state—a state matter. Let me say this, if he says he [44] wanted to do it or thought he needed to, I wouldn't object—have objected, if that's what you mean.

Q All right. But I guess, I take it then, the decision later—what point, was it at the—after the interrogation that you decided to go federal with it?

A Oh, no sir. After I contacted the United States Attorney's office later that evening.

Q All right. And is it true that you had to use your—you had a statement, a 302, that you prepared in this matter?

A Yes, sir.

Q And I'm going to show you what's—and I don't have an extra copy of it, and I apologize, but—

THE DEFENDANT: May I approach the witness, Your Honor?

THE COURT: You may.

BY MR. ROSKE:

Q Show you what I would like to mark as Exhibit A, and ask [45] you if you can identify that?

A It appears to be a copy of my report.

Q And this is a report that you prepared after the interrogation process?

A Yes, sir.

Q This is, I guess, a report you dictated?

A Probably dictated it.

Q From your rough notes?

A Yes, sir.

Q And for the record, you made rough notes and you preserved them and you turned them over to the U.S. Attorney here prior to Court, right?

A Yes, sir.

Q And are these—and I can show you that they've been marked as B—okay, I'll give you A—and ask you if you can identify that?

A Appears to be my—oh, it is, here's my initials.

Q And those were the rough notes that you took of the interrogation?

A Yes, sir.

Q And you also took a log?

A Yes, sir.

Q Of what occurred?

A Yes, sir.

Q Which I'll propose as C, ask you if you can identify [46] that?

A Yes, sir. It's my log or a copy of it, it looks like.

Q All right. That's your handwriting, you recognize it?

A Right, Mm - hmm.

MR. ROSKE: Okay. This should be B, this should be C here.

Your Honor, I would move to admit the rough notes and long as part of this hearing.

MR. GREEN: No objection, sir.

THE COURT: They'll be admitted. You're not moving for Exhibit A?

MR. ROSKE: I'm—I'll also move to have that in, also, Your Honor.

MR. GREEN: No objection, sir.

THE COURT: All right. Exhibit A, B and C will be admitted.

(Defendant's Exhibits A, B, and C admitted)

MR. ROSKE: Pass the witness, Your Honor.

MR. GREEN: No further questions, sir.

THE COURT: You may step down, sir. Thank you.

THE WITNESS: Yes, sir, Thank you, Your Honor.

THE COURT: The witness is excused, I assume?

MR. GREEN: Yes, sir. The government would rest, sir.

THE COURT: Does the defendant wish to call any [47] witnesses?

MR. ROSKE: May I have the Court's indulgence?

THE COURT: Yes.

(Pause in the proceedings)

MR. ROSKE: Your Honor, after consulting with my client he indicates he would like to testify at this hearing.

THE COURT: All right. Come forward, Mr. Banks, and be sworn.

LASHAWN LOWELL BANKS,
DEFENDAN THEREIN, IS SWORN

THE CLERK: Thank you. You may be seated. Please state your name for the record.

THE WITNESS: Lashawn Banks. You want me to spell it?

THE CLERK: Your last name, please.

THE WITNESS: B-A-N-K-S.

THE CLERK: Thank you.

DIRECT EXAMINATION

BY MR. ROSKE:

Q Lashawn, I'm going to ask you some preliminary questions and, I guess, I'll use a leading format just to rush things along here. You understand that at this hearing, even though it is not your trial, you're not requires to offer testimony on your behalf?

A Yes.

Q You understand that I've consulted with you about your [48] taking the stand and offering testimony, and that decision to offer testimony is one that you understand can be made by you, but you alone. I can't make it for you, and Mr. Green can't make it for you, and not the Judge?

A Yes.

Q Do you understand that you have the right to remain silent, and that silence wouldn't be used

adversely by the Court for deciding the issues that we've presented to it on this pretrial motion?

A Yes.

Q You understand that you, in spite of the right to remain silent, et cetera, the admonitions that I've made on the record, that you need to indicate on the record whether it's your free and voluntary decision to offer testimony at this hearing?

[48]

A Yes.

Q Lashawn, I believe you're qualified to testify at this point with the canvass I've made.

MR. ROSKE: Your Honor, is that what you find?

THE COURT: The Court is satisfied. Yes.

MR. ROSKE: Okay.

BY MR. ROSKE:

Q Lashawn—

THE COURT: Do you have any objections?

MR. GREEN: No objection, sir.

[49]

THE COURT: All right.

MR. ROSKE: All right.

BY MR. ROSKE:

Q Lashawn, I'm going to ask if you can recall the 15th of July, 1998?

THE COURT: Excuse me, counsel, before you begin, let me make sure he understands one further thing with respect to his testimony.

Do you understand that if you elect to testify about any matter, that the government will have the opportunity to cross-examine you about that matter that you testify about?

THE WITNESS: Yeah, I understand.

THE COURT: Okay.

MR. ROSKE: All right.

THE COURT: You may proceed, counsel.

MR. ROSKE: Thank you, Your Honor.

BY MR. ROSKE:

Q I want you to call your memory back to a time in the 15th of July of 1998. That was sometime ago. Do you—could you tell me—well, let me ask you, sometime prior to that, do you recall on the 14th of July, 1998, do you recall what you were doing that night?

A Yes.

Q What were you doing?

A Basically, drinking and snorting cocaine and smoking weed [50] basically all night.

Q And do you recall when you retired that evening, when did you go to bed?

A I didn't.

Q You remained then awake throughout the entire night?

A Yes.

Q And did you try to go to sleep that night?

A No, not really. I was—I preferred to just do—get up.

Q Okay. And what did you do in the morning hours of the 15th of July, 1998, if anything?

A Nothing. Just sat up. Same thing, smoke weed, snort cocaine. I had this drink that I had just came across that I was drinking all night, maybe a shot in the morning, and—

Q What was that? Just—was it malt liquor? Was it—

A It's called Goldschlagers. Goldschlagers.

Q Okay.

A That's the name of it.

Q Was this something that you had in the apartment, or is this something that somebody brought over?

A Yes. It was—it was on the bar.

Q All right.

A Along with some other drinks that I had sitting up there.

Q All right. Did there—do you recall in the afternoon, maybe about 1:30, 1:45, what you were doing?

[51]

A Taking a shower.

Q Where in the apartment is this shower located? Is it at the back of the apartment? Is it the front of the apartment? The side of the apartment?

A In the middle on the side. Yes.

Q How many bedrooms is this apartment?

A Two.

Q And is there only one bathroom?

A Yes.

Q And that's off this hall?

A Yes.

Q Does the hall look down at the front door?

A No.

Q Okay. Now you're in the shower. You—do you have the water running?

A Mm-hmm.

Q What happens next?

A I heard a boom, I come out the bedroom, and that was it, mask, I lay on the floor, and knees in my back, and, you know, things like that, and they—they were searching the house.

Q Did you ever hear—you've heard earlier in the hearing this afternoon that there was a knock at the door and announce, " police, search warrant," or something to that effect. You ever hear—

A I did not hear—

[52]

Q —anything like that?

A I did not hear any of that. I heard a boom—

Q What did you believe—

A —like somebody shot the door open.

Q —the boom to be?

A I thought somebody shot the door open.

Q Okay. And when you came out, what was the first thing you saw?

A Guns and black masks and all black outfits, shirts, I guess, is what they had on, black pants, guns, black masks, and, you know, sweeping the house like this.

Q All right. You were on the floor then at the point after their entrance?

A Yeah, face down.

Q And were you ever moved from the floor?

A Yeah. The police pulled me up eventually.

Q And where were you taken, if anywhere?

A To the bath—I mean, no, to the kitchen table.

Q All right. Were you—did there come a time that you were provided something to wear?

A Yes, after I ask about it because I didn't want them to take me outside naked.

Q Okay. Do you recall whether that was early in—was there an interrogation process after that or not?

A After—after what?

[53]

Q After you being placed in the kitchen?

A Yes. After they placed me in the kitchen, yes, they started asking questions.

Q Okay. Was that before or after you got some clothing?

A It was—it was like in the middle. They asked questions, then they decided they wanted to give me the underwear. I thought—constantly was saying, you know, I don't want to go outside, ' cause that was my concern about them taking me outside in front of the people naked.

Q All right.

A There was no towel, like he stated, I wasn't on no towel. Never a towel.

Q All right. Did there—do you recall Officer Crespo testifying —

A Yes.

Q —as the first witness for the government?

A Yes.

Q Do you recall him as being present?

A I couldn't tell, they all had on masks. Officer Dick Tomasso, and there was another white gentleman sitting at the table with us the only ones that didn't have a mask on.

Q What were you feeling at that—at that time that—after the officers had smashed in the door?

A I was nervous, I was scared. I didn't—you know, I didn't know what was going on. I never been through anything [54] like that before, so, basically, I was just scared.

Q You—you've heard testimony that—by Agent Tomasso that you were calm?

A Yeah, I heard him.

Q Do you agree with that?

A No, I don't.

Q Were you concerned about what your fate would be as a result of these police officers and agents discovering drugs in your apartment?

A Yes, I was.

Q What was going through your mind?

A Basically, there was a lot of things going through my mind because I really couldn't even think clearly. It was, you know, I got one officer over here yelling, "this can get you life," got guns over here. You know, this is—it was a lot of commotion—

Q All right.

A —it was a lot of commotion.

Q Do you recall being presented with advice of rights form?

A Yes, I do.

Q Do you recall going over that form with Special Agent Tomas so?

A I don't believe we did. I signed it. Also I signed a consent to search my vehicle which I thought was all the same [55] thing, 'cause he said—he asked me, you know, can I search the vehicle, and he just leave me the paper. I signed it.

Q Do you believe that you were under the influence of the alcohol that you'd consumed, I guess, the morning prior, the night prior, sometime prior?

A Yes, I was. I never—I never went to sleep, and I was basically doing it all night long. And that's a real potent—that's a real potent drink.

Q What about the different drugs that you were taking? Would you think they still had an effect upon you at the time of the interrogation?

ASure, because I had freshly snorted a lot and smoked a joint right before I got in the shower.

Q How much time elapsed between your doing that prior to the shower and your being interrogated?

A I wasn't in the shower that long, so—

Q Fifteen minutes?

A About that. It's about that. I wasn't in the shower long, so—

Q Is it safe to say that you had concluded the shower at the time that you heard the boom, or not?

A No, I wasn't concluded yet.

Q Okay. Do you recall this business about—was there any time, do you recall. Mentioning consulting with a lawyer?

A Yes.

[56]

Q Could you tell the Court about that?

A Basically, it was basically like he said, that he was talking about giving up somebody. I was like, well, I think I need to talk to my attorney before we—

Q I'm sorry. I missed that. Basically—

A It was the way—

Q —the way he said it about giving up somebody?

A Giving up somebody, so I, you know, I said I—

Q What do you mean by that, giving up somebody?

A He wanted me to tell on somebody. So, I told him I wanted to talk to my attorney before we even continue the, you know, questioning.

Q All right. How far into the interrogation did you make this—or was this topic brought up?

A I'm not really sure.

Q Was it at the very end? Was it at the middle? Or was it near the beginning?

A Hmm, maybe—maybe in the middle sometime.

Q All right. Do you recall—were you—you were afforded at one point, then, the opportunity to make a call, correct?

A Yes.

Q We heard testimony about that earlier. Who did you call?

A I called my girlfriend.

Q Why did you call your girlfriend?

[57]

A To secure the house because they said they was taking me to jail, so I needed somebody to, you know, watch the house while I was gone.

Q Well, how long did this interrogation last from beginning to end?

A Since the time they came through the door since—since they left. I was at the table the whole time. Just—

Q Well, would you say a half hour?

A No, it'd have to be—

Q —More than a half hour?

A —more than that. Maybe—

Q Less than a half hour?

A I'd say at least a hour, at least a hour we was—we was talking, at least.

Q Do you recall anybody mentioning any time that you that you were facing?

A Yeah. It was a guy with a black mask, saying—in the kitchen, this will get you life; with the guns, you know, you're facing a lot of time. And they also had mentioned going through my mother's house, I wouldn't see my kids 'cause they knew I had two kids, stuff like that.

Q Did you feel at any time concerned about the weapons that you saw, the officer's—

A Yeah, because I didn't know who they were when they first came through the door. I didn't really [58] click into mind who they really were until they set me down at the table, and I saw Officer Tomasso's badge hanging from his—from his neck.

Q And you—you were under this state of excitement for what period of time during the interrogation?

A The whole time, you know, I couldn't really believe what was going on.

Q At any time were you handed a thing to write out anything on?

A No, I wasn't.

Q Did you see a tape recorder?

A No.

BANKS - CROSS

Q Do you think you were in a good frame of mind when you waived your rights on that Miranda warning form?

A If you—if you call getting high all night and drinking all night a good state of mid. I wouldn't

MR. ROSKE: Okay. I'm going to pass the witness.

THE COURT: You may cross-examine, Mr. Green.

MR. GREEN: Yes, sir, thank you.

CROSS - EXAMINATION

BY MR. GREEN:

Q Mr. Banks, you said you'd been up drinking that night previously, is that correct?

A Yes.

Q What time did you quit drinking?

[59]

A I don't really watch the clock, so, you know, I don't really know, but I don't—I didn't stop. I had another drink in the morning, I was snorting and smoking all night long.

Q Did you have friends over?

A A couple.

Q What time did they leave?

A Shit, I don't know.

Q Was it daylight or dark when they left?

A It was nighttime.

Q You think it was earl in the morning?

A Maybe.

Q But—

A I don't know. I don't know, we wasn't watching the clock. We—we getting high. The time doesn't really matter.

Q Before midnight of after?

A We don't have nowhere to go.

Q Can you tell me if it was before or after midnight?

A No, I really can't.

Q And you jumped in the shower that afternoon, is that correct?

A Yes.

Q And you had soap in your hair, would you agree with that as the officer testified?

[60]

A Not in my hair. No.

Q You had soap on your body?

A Yeah.

Q 'Cause you hadn't finished taking your shower?

A Exactly.

Q And the shower is not near the front door, is that correct?

A No, it isn't.

Q It's—it's on the far side of the apartment?

A It's not—the apartment isn't that big, so it's like—it's—the hallway is very small off to the right. It's not a very big apartment.

Q But it's not next door to the front door?

A No.

Q And then you were showering?

A Yes.

Q And then you heard the boom?

A Exactly.

Q And then you started walking out of the shower, is that correct?

A. Exactly.

Q But you—

A When I heard the boom, I came out to see what was going on.

Q And you turned off the water?

[61]

A Yeah.

Q And then you stepped out of the shower?

A Mm - hmm.

Q Then you started walking down the hall?

A The hall's not that big, so, stepping out the shower is the hall.

Q So, you stepped out—

A Put it like that.

Q —of the shower, and started walking down the hall, right?

A I stepped out of the shower, an that is the hall. It's one step—

Q And—

A —two steps from the shower is—you can look left, see the door.

Q And were you—were you able to walk over there? Walk out of the shower?

A Yeah. It's not—it not that far.

Q Were you able to—

A It's not even—it's not even from here to—here to right here.

Q Maybe I—

A You just step out the shower two steps—

Q Maybe I should rephrase it. Were you able to walk physically out of the shower?

[62]

A Yeah. I'm not handicapped.

Q Were you able to shower okay?

A Of course.

Q And you remember hearing this boom, right?

A Mm - hmm.

Q And then you remember seeing the cops?

A Yeah.

Q And you remember going to the ground as they instructed you, correct?

A Yes.

Q They told you to?

A Mm - hmm.

Q And you heard 'em, is that right?

A Yes, I heard 'em.

Q And you understood 'em?

A Yes.

Q And then they brought you to the table, right?

A Mm - hmm.

Q Then you remember they did give you some clothes, you say, once the questioning started, is that right?

A Mm - hmm.

Q But you remember distinctly that—

A They gave me a pair—

Q —they gave you clothes?

A —of underwear. Yeah.

[63]

Q Now, you're able to talk to the officers at this time, is that correct?

A Yes.

Q Did you understand what was going on at that time?

A Basically, they was looking for drugs. Yeah.

Q And you understood that at least Officer Tomas so was a police officer, is that right?

A Mm - hmm.

Q But you don't remember signing this form that he gave you?

A Yes. I signed two forms.

Q But you didn't know that you were waiving your rights?

A No, I—he told me that he wanted to search the vehicle, just leave me a—matter of fact, I don't even think it was him that's leaving me the paper, it was some other tall guy that's leaving me the paper, I believe, and asking me, can they search the vehicle.

Q So, it's your testimony that—

A So, I signed it.

Q —Mr. Tomasso didn't go over your rights with you at all?

A No, I believe he did say 'em verbally, though.

Q And that's when you were first brought to the table?

A I would guess so. I'm not sure about that, but I would guess so.

[64]

Q How was Mr. Tomas so acting toward you at that time?

A He—he was—he was calm. He was calm.

Q Did he threaten you in any way?

A No, it wasn't him, it was the other guys yelling about all the time I was looking at, and, you know, I'd never see my kids again, and all this other stuff. Good cop - bad cop type thing. He the good cop while the rest of 'em, you know, are yelling all across the apartment.

Q And you heard Mr. Tomasso talk about at the time when he said that you related to him that you didn't want to make a deal concerning his suppliers until you talked to the—your attorney to see if it would be worth it, is that correct?

A Mm - hmm.

Q Is that a fair statement from Mr. Tomasso?

A He talked about that and I said I wanted to talk to an attorney, you know, first before we go into that questioning.

Q And you were talking about your suppliers at that point?

A No, he was, I wasn't. I was telling him that I wanted to talk to my lawyer before we even go into that line of questioning.

Q And you said this was in the middle?

A It was—

Q What do you—and what in your mind do you mean—

A He was—

Q —when you mean in that line of questioning? What do [65] you mean?

A Come again?

Q What did—you said it was—you said you didn't want to talk about that line of questioning, go into that line of questioning. What line of questioning are you referring to in your mind?

A When he was talking about my suppliers. I told him I want to, you know, discuss anything with a lawyer before we even, you know, go into all that.

Q Discuss the suppliers?

A Yeah.

Q But not you?

A What about me?

Q Were you still willing to discuss you?

A Shit. The lawyer part came into this about the suppliers. When he said something about the supplier, I told him I want to discuss—you know, talk to a lawyer before we even go into all that.

Q And you say that was concerning your suppliers?

A Exactly.

Q And you say this may have happened in the middle, or it did happen in the middle?

A Yeah, it may have.

Q So, if we could just get to the point, are you saying you were trying to invoke your right to counsel at that point?

[66]

A Yes.

Q Did you continued answering his questions?

A Yeah, 'cause he was—he asked me, I remember one question he asked me, he asked me did I have drugs at my mother house, so I decided to answer that question, no, because I didn't want them going down there with their, you know, with their craziness.

Q Did you answer anything else after you say you tried to get a lawyer?

A I don't recall. I know that was one question that I know for sure I did answer.

Q Do you remember him talking to you any more after that?

A Basically, he—they gave me some clothes. They took me to get some clothes and they brought me to jail.

Q Oh, so after you said that, there really wasn't anymore questions other than your mother's house statement.

A That I can recall.

Q Well, you remember a lot of the details up to that point, though, right?

A What you mean?

Q You remember the officers questioning you, right?

A Yeah.

Q And you say you don't remember signing the form, though, right?

A I said I did remember signing the form, but he told me it [67] was a form search me vehicle. I didn't—I didn't read it, I just signed it.

Q And you were able to make a phone call, is that correct?

A Yes.

Q And you didn't call a lawyer, right?

A No. I figured I'd do that when I get to jail.

Q Did you ever tell Special Agent Tomasso, "I want to speak to an attorney, I don't want to answer any more of your questions"?

A No, I did not.

Q Did you happen to notice these officers when they came through that they were wearing uniforms that said, or they were wearing jackets or vest that said, "Police" on it?

A I don't believe their uniform said, "Police" on the front. I don't—I don't—I don't think so. I'm not—I don't think they said "Police" on the front. I believe it said something on the back. I don't think it said, "Police" on the front, though.

Q Did you have any reason to believe that once these people identified themselves that they were not police officers?

A Did I have reason to believe it? Basically, I didn't know what to believe. I done heard of cases when people get their door kicked in, people acting like they're police officers, and just there to do robberies. Like I said, I've never been through that before, so I don't know if they were [68] the police, if they were robbers. I've never known the police to come through with hoods on their face. See what I'm saying?

MR. GREEN: No further questions, sir. Thank you.

THE COURT: Any redirect, Mr. Roske?

MR. ROSKE: No, Your Honor.

THE COURT: Thank you, sir. You may step down.

THE WITNESS: Thank you.

THE COURT: Does the defendant have any other witness, Mr. Roske?

MR. ROSKE: No, we have no other witnesses to call, and we would then submit the matter, if the Court wants to hear some argument.

THE COURT: I'll leave that to counsel. If you want to make some short comments, I would be happy to hear 'em.

MR. ROSKE: I guess a couple of things that, you know, I'm just going to try to address some things that aren't clear in what we've raised in the pleadings. One thing that's kind of reared its head in the course of the hearing wasn't fully briefed, of course, is the issue of the invocation, whether there was an invocation for the right of counsel or not, that's something you're going to have to decide.

If there was an invocation to the right of counsel, then I think the law is clear that the interrogation should [69] have entirely ceased at that point, and you know, they didn't have to get him counsel at that point, but they certainly shouldn't have continued the interrogation.

The Court is going to have to have to determine the issues of intoxication. Clearly there is a discrepancy in the testimony, I see, between the officers and the defendant in terms of mental state. I think that voluntary intoxication does, of course, affect ability to make an intelligent and knowing waiver of one's Miranda rights. It may also impact upon the ability to see the need to have counsel or to request counsel.

I think also, probably the Court is faced with the knock and announce issue. I think it's—under the circumstances, the officers said they knocked, announced and waited, but we have the testimony of the defendant in contrast that the only thing he heard was the boom. Apparently, I guess the only middle ground for the Court is that perhaps because of the shower running and the circumstances of the knock and announce not being loud or sufficiently loud enough to have him hear and respond to the door, the time frame between the knock and announce and the forcible entry is fifteen or twenty seconds, depending upon which of the two officers involved are.

I'd submit that that weight is also a factor the Court has to weigh in the balance. The officers seemed to [70] think that waiting fifteen seconds is an inordinate amount of time. What if someone is in bed asleep? They're expected, under this scenario, to instantly be at the door. I think that that doesn't—isn't the policy behind the knock and announce. I think there has to be some effort to wait longer or to repeat the process, and that that apparently wasn't done, at least according to what I heard here today.

And, Your Honor, if the Court would like additional points and authorities on any of these matters, I'd be happy to do that. I would point out to the Court that I'm starting a jury trial in front of Judge Rawlinson tomorrow, and so it might take me a couple of days to be free of that matter to respond to the Court.

THE COURT: I don't know that I—before you leave, Mr. Roske, I don't know that I need additional briefing, but what do you understand the law to be as to

what constitutes a reasonable amount of time after knocking and announcing?

MR.ROSKE: Well, Your Honor, I think that fifteen seconds isn't realistic enough to—if the purpose behind that rule—

THE COURT: I understand that you're arguing that you don't think fifteen seconds is long enough, but—

MR. ROSKE: Well, I think that—I think something around thirty seconds or forty-five seconds would be a threshold amount of time to allow somebody to meaningfully go [71] from one end of an apartment to another. You don't really give a person any opportunity to respond if you've only waited fifteen seconds, and that would assume that—I understand the officers are thinking of their safety first, and I understand that's their concern, but we also have a statute that we're also trying to comply with that intends that there be a voluntary entry permitted, and if that's not a realistic amount of time to wait fifteen seconds and, in fact, in this case, he's in the shower. How could he respond in that fashion meaning fully?

THE COURT: Thank you.

MR. GREEN?

MR. GREEN: Yes, sir. I think the Ninth Circuit, and I may be wrong about this, I think they looked at around eight to ten seconds for the knock and announce period for the grace period before they go in. I think thirty seconds, is way too long for a crack dealer with guns in his apartment when you have officers trying to make entry. I think that's ridiculous.

He was in the shower. If they would have waited, you know, another thiry seconds or maybe another ninety seconds or a hundred and twenty seconds, he would have never heard it 'cause he was in the shower. The only thing he hears is the battering ram through the door. So, that point is moot.

[72]

The defendant brings up in the motion that he was to incapacitated by all the excitement. Well, excitement is not a matter of coercion which you must find for the governments not to be able to use his confession. If you'd look, sir, he even admits he's able to talk, he's able to walk, he's able to read, he's able to follow instructions, he's able to carry on conversations, he's able to walk out of the apartment, he's able to request clothes, he's able to call his girlfriend, he's able to be worried about that, he's able to be worried about things about such as well, maybe I shouldn't tell you 'til I talk to my attorney type things. This person is engaged in conversation, he's able to think and read and write.

Now, even though he may not remember it now, The FBI agent certainly remembers him being able to execute his rights at the time he saw was witnessed by two individuals.

Further, sir, the defense brings up its—mention that it reared its ugly head concerning the request for attorney. I'd ask that Special Agent Tomasso's statement be looked at as Exhibit C, which I've provided to you. On page 27, the paragraph—last full paragraph explains that part, just as Special Agent Dick Tomasso said. It's corroborated by him. We could

certainly recall the—Police Officer Crespo to—if you need any more things on that.

As far as being able to brief more matters, sir, I [73] don't think anything is necessary at this point. I think we've covered everything. Of course, if you would, we would be able to clarify any such issues that you need to be addressed. Thank you.

THE COURT: Thank you.

The Court will take the matter under submission.

PROCEEDING CONCLUDED AT 4:00 P.M.

* * * * *

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Supreme Court, U.S.
FILED
MAY 12 2003
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No. 02-473

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

LASHAWN LOWELL BANKS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether law enforcement officers executing a warrant to search for illegal drugs violated the Fourth Amendment and 18 U.S.C. 3109, thereby requiring suppression of evidence, when they forcibly entered a small apartment in the middle of the afternoon 15-20 seconds after knocking and announcing their presence.

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In the Supreme Court of the United States

No. 02-473

UNITED STATES OF AMERICA, PETITIONER

v.

LASHAWN LOWELL BANKS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 282 F.3d 699. The district court's order denying respondent's motion to suppress (Pet. App. 20a-21a) and the recommendation and report of the magistrate judge recommending against suppression (*id.* at 22a-32a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 5, 2002. A petition for rehearing was denied on May 24, 2002 (Pet. App. 33a-34a). On August 14, 2002, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including September 21, 2002. The petition for a writ of certiorari

was filed on September 23, 2002 (a Monday), and was granted on February 24, 2003. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 3109 of Title 18 of the United States Code provides:

> **Breaking doors or windows for entry or exit**
>
> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

STATEMENT

Respondent was charged with possession of a controlled substance with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and with possession of a firearm as an unlawful drug user, in violation of 18 U.S.C. 922(g)(3). After the district court denied his motion to suppress evidence, he pleaded guilty to both

counts, reserving the right to appeal the denial of his suppression motion. The court of appeals reversed and remanded the case to the district court, holding that law enforcement officers violated the Fourth Amendment and 18 U.S.C. 3109 by waiting only 15-20 seconds after knocking and announcing their presence before forcibly entering respondent's apartment. Pet. App. 1a-3a, 22a.

1. On Wednesday, July 15, 1998, at approximately 2 p.m., officers from the Las Vegas Police Department and the FBI executed a search warrant issued by a state court for cocaine and drug paraphernalia at respondent's apartment in North Las Vegas, Nevada. Pet. App. 2a, 25a-26a; see J.A. 59-60 (search warrant). The warrant was based on information, corroborated by a controlled drug buy, that respondent was selling cocaine at his apartment. J.A. 23-26. The officers knew the apartment to be a small, two-bedroom unit. Pet. App. 14a; J.A. 45-46. They first positioned themselves at the front and rear of the apartment building and then followed the statutory "knock and announce" procedure by loudly knocking on the front door and announcing "police search warrant." Pet. App. 2a; see 18 U.S.C. 3109. The knock and announcement were loud enough to be heard by the officers positioned at the rear of the building. Pet. App. 14a. The officers waited 15-20 seconds and, hearing no response, forcibly entered the apartment using a battering ram on the front door. *Id.* at 2a, 26a; see J.A. 73-75, 97-98.

Respondent claimed that he did not hear the officers knock and announce because he was in the shower, but that he did hear the forcible entry. J.A. 124-125; Br. in Opp. 3. Upon entering the apartment, the officers discovered respondent standing outside the bathroom, having just emerged from the shower. Pet. App. 26a;

J.A. 76, 124- 125. The search of respondent's apartment turned up a .380 caliber semi-automatic pistol with a laser sight and seven rounds in the magazine, a .40 caliber semi-automatic pistol, a .22 caliber Beretta pistol, a bullet-proof vest, a scale, approximately $6000 in cash, and approximately eleven ounces of crack cocaine. J.A. 34-38, 47, 51.

Respondent was charged with possession of a controlled substance with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and possession of a firearm as an unlawful drug user, in violation of 18 U.S.C. 922(g)(3). J.A. 11-12. He moved to suppress evidence, including statements that he made to law enforcement officers following his arrest, arguing, *inter alia*, that the officers violated the Fourth Amendment and 18 U.S.C. 3109 by failing to follow appropriate knock-and-announce procedures. See Pet. App. 23a; J.A. 13-21.[1] After the district court denied the motion, respondent pleaded guilty to both counts, reserving his right to appeal the denial of his suppression motion. See Pet. App. 1a.

2. a. A divided panel of the court of appeals reversed the district court's denial of respondent's motion to suppress. The majority held that the officers, having knocked and announced and received no response, failed to wait a reasonable amount of time before forcibly entering the apartment, thereby rendering the search

[1] In support of his motion to suppress, respondent also raised claims under the Fifth and Sixth Amendments. Those claims were rejected by the courts below, see Pet. App. 8a-11a, and are not at issue in this Court.

unconstitutional and in violation of 18 U.S.C. 3109.[2] Pet. App. 4a, 7a-8a.

The majority set forth four categories of knock-and-announce cases, each requiring a different period of delay before an officer may enter a residence after knocking and announcing and receiving no response:

> (1) entries in which exigent circumstances exist and non-forcible entry is possible, permitting entry to be made simultaneously with or shortly after announcement; (2) entries in which exigent circumstances exist and forced entry by destruction of property is required, necessitating more specific inferences of exigency; (3) entries in which no exigent circumstances exist and non-forcible entry is possible, requiring an explicit refusal of admittance or a lapse of a significant amount of time; and

[2] Although the search warrant in this case was issued by a state court and local law enforcement officers, rather than federal agents, used force to enter respondent's apartment, the federal knock-and-announce statute, 18 U.S.C. 3109, is applicable because both federal agents and local officers participated in executing the search warrant and interviewing respondent immediately after his arrest. J.A. 34, 51; Pet. App. 25a-26a; see *United States* v. *Tavares*, 223 F.3d 911, 916 (8th Cir. 2000) (finding Section 3109 applicable to search based on state warrant where federal agents had contact with local officers before search and federal agents assisted local officers in warrant execution); cf. *Lustig* v. *United States*, 338 U.S. 74, 78-79 (1949) ("[A] search is a search by a federal official if he had a hand in it * * * . The decisive factor * * * is the actuality of a share by a federal official in the total enterprise of securing and selecting evidence by other than sanctioned means."); *Byars* v. *United States*, 273 U.S. 28, 33 (1927) (applying federal exclusionary rule to execution of a state search warrant where "the participation of the [federal] agent in the search was under color of his federal office and * * * the search in substance and effect was a joint operation of the local and federal officers").

> (4) entries in which no exigent circumstances exist and forced entry by destruction of property is required, mandating an explicit refusal of admittance or a lapse of an even more substantial amount of time.

Pet. App. 5a-6a. Thus, under the majority's scheme, whether officers have waited a sufficient period of time before entering turns on two factors: (1) whether the entry was forcible and thus involved the destruction of property, and (2) whether exigent circumstances existed. *Ibid.* The majority concluded that no exigency was present in this case, placing the entry in the fourth category (forcible entry with no exigency), requiring the maximum period of delay. *Id.* at 6a.

The majority next articulated a non-exhaustive list of factors to be considered in assessing the reasonableness of an officer's waiting period once the proper entry category has been determined. Those factors include:

> (a) size of the residence; (b) location of the residence; (c) location of the officers in relation to the main living or sleeping areas of the residence; (d) time of day; (e) nature of the suspected offense; (f) evidence demonstrating the suspect's guilt; (g) suspect's prior convictions and, if any, the type of offense for which he was convicted; and (h) any other observations triggering the senses of the officers that reasonably would lead one to believe that immediate entry was necessary.

Pet. App. 6a-7a.

Analyzing the entry in the instant case, the majority noted that sound traveled easily through respondent's small apartment, and that the officers heard no noises coming from the unit suggesting that an occupant was moving away from the door or doing anything else that

would indicate a refusal of entry. Pet. App. 7a. For those reasons and in view of its category scheme, the majority held that a 15-20 second delay after knocking and announcing was not "sufficient in duration to satisfy the constitutional safeguards." *Id.* at 8a. The majority did not indicate how much additional delay before entering was necessary to satisfy the Fourth Amendment.

b. Judge Fisher dissented, concluding that the majority had neglected its own list of delay factors. Judge Fisher emphasized that the apartment was small, the search was executed in the middle of the afternoon, the officers had strong evidence that respondent was dealing drugs out of the apartment (including corroboration from a controlled cocaine buy), and the officers could reasonably have been concerned about the destruction of evidence. Pet. App. 14a. Under those circumstances, Judge Fisher concluded, "the officers could reasonably have assumed [that respondent] had heard at least the loud knock and probably the announcement," and a 15-20 second delay was sufficient. *Id.* at 14a-15a. He also noted that because respondent was in the shower and did not hear the officers knock and announce, additional delay before entry would have made no difference in how the events unfolded. *Id.* at 16a. Finally, Judge Fisher emphasized that the majority opinion conflicted with the decisions of several other courts of appeals, which have held that similar delays before forcible entry were reasonable under similar circumstances. *Id.* at 16a-18a.

SUMMARY OF ARGUMENT

I. The Ninth Circuit's rigid, complex, and confusing four-part categorical scheme is inconsistent with this Court's longstanding recognition that the Fourth

Amendment does not "mandate a rigid rule of announcement," *Wilson* v. *Arkansas*, 514 U.S. 927, 934 (1995), and that the "general touchstone of reasonableness * * * governs the method of execution of the warrant." *United States* v. *Ramirez*, 523 U.S. 65, 71 (1998). Unlike the general reasonableness standard reflected in *Wilson* and *Ramirez*, the Ninth Circuit's categorical approach disregards the myriad factual circumstances and dangers confronting officers executing warrants, and in a variety of circumstances would reduce the knock-and-announce requirement to a "senseless ceremony," *Wilson*, 514 U.S. at 936. It also improperly relies on certain factors, such as the destruction of property, that have little or no bearing on the reasonableness of the officers' entry, while ignoring or minimizing other, highly relevant factors, such as the real risk that respondent would try to destroy evidence (by, for example, flushing the drugs down the toilet).

II. The court of appeals' emphasis, in calibrating the required period of delay, on whether officers need to destroy property in order to effectuate an entry contradicts this Court's holding in *Ramirez* that the reasonableness of a no-knock forced entry "depends in no way on whether police must destroy property in order to enter." 523 U.S. at 71. Property destruction during the course of a warrant execution may be a necessary consequence of the occupant's failure to open the door; it is not an independent factor that requires additional delay once the occupant fails to do so. The knock-and-announce rule protects the occupant's property interests by requiring officers in typical circumstances to notify the occupant of their presence and authority to enter, thus allowing the occupant the opportunity to admit the officers without property being broken. Once officers have reasonably determined that the occupant is denying them admittance, however, the resulting need to destroy property to gain entrance does not then require officers to wait an even longer time before attempting to execute the warrant.

III. Under the correct legal standard, the officers' actions in forcibly entering respondent's apartment after knocking and announcing their presence and waiting 15-20 seconds without hearing a response was reasonable. Respondent himself concedes that the officers went to his small apartment at 2 p.m. on a weekday to execute a valid search warrant for drugs, evidence that is readily disposable; that the officers "knocked loudly and announced 'Police, search warrant' in a loud authoritative tone"; that the officers did not hear any response; and that they waited at least 15-20 seconds after knocking and announcing before forcibly entering the apartment. Br. in Opp. 3. Respondent also acknowledges that he was in the shower at the time and did not hear the officers knock and announce. *Ibid.*; see Pet. App. 14a. Under such circumstances, the officers acted reasonably and did not violate the Fourth Amendment or 18 U.S.C. 3109.

IV. Finally, even if there were a knock-and-announce violation in this case, suppression of evidence would be an unjustified remedy. Because respondent was in the shower and did not hear the officers when they knocked and announced, events would have unfolded no differently had the officers delayed longer before entering. The search warrant authorized entry, and respondent would have been in the same position had the officers waited a few more moments before executing the warrant. Nor did any knock-and-announce violation lead to the discovery of the evidence in this case; the evidence was found as a result of the warrant-authorized search. Application of the exclu-

sionary rule in such circumstances places the government in a worse position than it would have been in had there been no violation and, therefore, imposes unjustified costs on society.

ARGUMENT

I. THE COURT OF APPEALS' RIGID CATEGORICAL SCHEME IS INCONSISTENT WITH THE GENERAL REASONABLENESS STANDARD GOVERNING THE KNOCK-AND-ANNOUNCE PRINCIPLE

The Ninth Circuit in this case adopted a complex, four-part matrix for determining how long officers must wait, after knocking and announcing their presence and receiving no response, before they may enter a residence to execute a valid search warrant. Under that matrix, officers executing a valid warrant must wait increasingly longer periods of time between announcement and entry depending on two factors: (1) whether the entry was forcible and thus involved some destruction of property, and (2) whether exigent circumstances existed. Pet. App. 5a-6a. The myriad other factors facing law enforcement officers in the inherently dangerous and unpredictable setting of warrant executions are given little or no weight in the court's analysis. The Ninth Circuit's rigid categorical scheme is inconsistent with the general reasonableness standard mandated by this Court's cases, which is intended to safeguard against mechanistic formalism.

A. The Knock And Announce Rule Is Part Of The Fourth Amendment's Requirement Of Reasonableness

In *Wilson* v. *Arkansas*, 514 U.S. 927 (1995), this Court recognized that "the underlying command of the Fourth Amendment is always that searches and

seizures be reasonable," and that the common-law requirement that officers announce their identity and purpose before entering a home forms part of the Fourth Amendment inquiry into the reasonableness of the officers' entry. 514 U.S. at 931 (citation omitted). In keeping with this recognition, the Court cautioned that "[t]he Fourth Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement." *Id.* at 934.

Two years later, in *Richards* v. *Wisconsin*, 520 U.S. 385 (1997), the Court rejected a proposed per se rule that, based on the special circumstances of the current drug culture, police officers are never required to knock and announce their presence when executing a search warrant during a felony drug investigation. *Id.* at 387-388, 392. The Court held instead that "to justify a 'no-knock' entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." *Id.* at 394. "This standard," the court held, "strikes the appropriate balance between the legitimate law enforcement concerns at issue in the execution of search warrants and the individual privacy interests affected by no-knock entries." *Ibid.*

In *United States* v. *Ramirez*, 523 U.S. 65 (1998), this Court reaffirmed that "[t]he general touchstone of reasonableness which governs Fourth Amendment analysis governs the method of execution of the warrant." *Id.* at 71 (citation omitted). In so doing, the Court rejected the court of appeals' conclusion that the Fourth Amendment and 18 U.S.C. 3109 hold officers to a standard higher than *Richards*' "reasonable suspicion" stan-

dard when a no-knock entry is effectuated by the destruction of property.[3]

B. The Ninth Circuit's Rule Departs From The Required Flexibility Of The Reasonableness Inquiry

The court of appeals' rigid framework for analyzing the timing of a forced entry to execute a search warrant cannot be harmonized with the flexibility inherent in the reasonableness standard. It has long been acknowledged that "[t]here is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances." *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 357 (1931). Under the reasonableness standard, accordingly, courts must analyze and apply Fourth Amendment principles in a fact-sensitive, case-by-case manner. See, *e.g.*, *Ker* v. *California*, 374 U.S. 23, 33 (1963) (noting that "[e]ach case is to be decided on its own facts and circumstances," and that "[t]his Cour[t] [has a] long-established recognition that standards of reasonableness under the Fourth Amendment are not susceptible of Procrustean application"). The need for a circumstance-specific application of the reasonableness standard applies equally to the timing of forcible warrant executions. See, *e.g.*, *United States* v. *Spikes*, 158 F.3d 913, 926 (6th Cir. 1998) ("The Fourth Amendment's 'knock and announce' principle, given its fact-sensitive nature, cannot be

[3] The reasonableness standard applies under both the Fourth Amendment and 18 U.S.C. 3109. See *Ramirez*, 523 U.S. at 73 (concluding that because Section 3109 codifies common-law announcement requirements reflected in the Fourth Amendment, Fourth Amendment decisions "serve as guideposts in construing the statute."); *Sabbath* v. *United States*, 391 U.S. 585, 588 (1968) (noting that warrantless entries are tested by Section 3109 criteria).

distilled into a constitutional stop-watch."), cert. denied, 525 U.S. 1086 (1999); *United States* v. *Jenkins*, 175 F.3d 1208, 1213 (10th Cir.) ("[T]he amount of time that officers must wait after knocking and announcing depends on the particular facts and circumstances of each case.") (citations omitted), cert. denied, 528 U.S. 913 (1999). To test the reasonableness of a warrant execution, courts examine the totality of the circumstances surrounding the execution of the warrant. See, *e.g.*, *United States* v. *Lipford*, 203 F.3d 259, 270 (4th Cir. 2000) ("[W]e measure the period between 'knock and announce' and forcible entry for reasonableness in light of the case's particular facts. In this regard, we consider the totality of the circumstances.") (citation omitted).

The court of appeals characterizes its categorical rules as merely "aids in the resolution of the essential question whether the entry was reasonable under the circumstances." Pet. App. 6a. But by limiting its analysis to two factors and narrowly dictating when and in what manner those factors may be considered, the court of appeals' scheme arbitrarily constrains application of the reasonableness standard. The Ninth Circuit's rigid categorical scheme would require that, absent exigent circumstances, officers must allow for "a lapse of a significant amount of time" before making a *non-forcible* entry. Where, however, that same entry would require *force*, which the court equated with the need to destroy some property, the officers must receive "*explicit refusal* of admittance or *a lapse of an even more substantial amount of time*" after knocking and announcing. *Id.* at 5a-6a (emphasis added). Taking that rule at face value, it appears that the court of appeals would require officers faced with a visibly barricaded door but no exigent circumstances either to receive express refusal of admittance or to delay "an

even more substantial amount of time" before attempting to enter the premises. But in such circumstances, the barricaded door, which will have to be damaged for the officers to enter, itself may support the conclusion that their admittance was *constructively* denied or that prompt entry was reasonable. See, *e.g.*, *United States* v. *Cooper*, 168 F.3d 336, 338 (8th Cir. 1999) (upholding no-knock entry in part because house had "an iron security door on the front door and steel bars on all windows"); *United States* v. *Stowe*, 100 F.3d 494, 499 (7th Cir. 1996) (upholding no-knock entry in part because apartment protected by a steel door), cert. denied, 520 U.S. 1171 (1997); *United States* v. *Hawkins*, 102 F.3d 973, 976 (8th Cir. 1996) (upholding no-knock entry in part because house was "barricaded by barred security doors and windows"), cert. denied, 520 U.S. 1179 (1997).

Likewise, absent exigent circumstances, that same rigid rule would appear to require officers executing a search warrant at a residence they knew to be locked and empty to go through the ritual of knocking and announcing at the empty building and then waiting "an even more substantial amount of time" before forcibly entering. Such a result is contrary to the settled proposition that the knock-and-announce requirement does not compel officers to engage in "senseless ceremon-[ies]," *Wilson*, 514 U.S. at 936, including knocking and announcing where doing so would be "futile." *Richards*, 520 U.S. at 394. Cf. *United States* v. *Mendoza*, 281 F.3d 712, 717 (8th Cir.) ("[I]t belies common sense to think officers should be forced to comply with formalistic rules when the circumstances direct otherwise."), cert. denied, 123 S. Ct. 515 (2002).

Irrespective of the need to destroy property, moreover, numerous considerations bear on how long

officers should pause before they may reasonably infer that they have been constructively refused admittance to a residence. As the court of appeals itself recognized, but failed properly to consider, examples of such considerations include the size, location, and physical configuration of the dwelling, the time of day at which the warrant is executed, the nature of the alleged offense and the strength of the evidence against the occupant, the occupant's criminal history, and reasonable concerns that the occupant might attempt to destroy evidence or otherwise frustrate the purposes of the search. See Pet. App. 6a; *id.* at 16a (dissenting opinion criticizing majority below for giving "little or no weight" to many relevant factors). But under the Ninth Circuit's scheme, officers must still wait an unspecified "even more substantial amount of time" before executing a valid warrant through a forcible entry (unless they have a reasonable suspicion that their safety may be jeopardized), regardless of the presence of these other highly relevant factors. The court of appeals' framework thus places artificial constraints on the operation of the reasonableness standard, in addition to violating this Court's longstanding principle that "it is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant —subject of course to the general Fourth Amendment protection 'against unreasonable searches and seizures.'" *Dalia* v. *United States*, 441 U.S. 238, 257 (1979).

As this Court made clear in *United States* v. *Arvizu*, 534 U.S. 266 (2002), where this Court reversed a similarly flawed Fourth Amendment standard created by the Ninth Circuit, the Fourth Amendment's general reasonableness requirement cannot be reduced to a set

of rigid legal rules. *Id.* at 273. That is particularly true where, as here, those rigid rules fail to take into account the variety of situations and dangers facing law enforcement officers. As was the case in *Arvizu*, "the approach taken by the Court of Appeals" in this case is grounded in a distrust of "fact-specific weighing of circumstances," *id.* at 272, and "does not take into account the 'totality of the circumstances,' as [this Court's] cases have understood that phrase," *id.* at 274.

II. THE NINTH CIRCUIT'S EMPHASIS ON PROPERTY DAMAGE IS INCONSISTENT WITH THIS COURT'S DECISIONS

The court of appeals' decision fundamentally misconstrues the role that property destruction plays in determining the reasonableness of a delay between notice and forcible entry. Properly understood, the knock-and-announce rule provides protection for property by giving an individual a reasonable opportunity, under all the circumstances, to open the door. The need to destroy property if the door is not opened does not lengthen the period that officers must wait for such compliance.

A. Property Damage Does Not Increase The Burden On Officers To Justify A No-Knock Entry

The knock-and-announce principle serves several interests. First, it protects "the individual privacy interests intruded upon by a no-knock entry." *Richards*, 520 U.S. at 385. Although a search warrant justifies a significant intrusion on the occupant's privacy interests, an announcement before entry tempers the suddenness of the invasion of privacy. See *id.* at 393 n.5. Second, the knock-and-announce rule safeguards law enforcement officers against the possibility that the occupant will mistakenly assume that his or residence is being

invaded by criminal intruders. *Sabbath* v. *United States*, 391 U.S. 585, 589 (1968); *Miller* v. *United States*, 357 U.S. 301, 313 n.12 (1958). Third, prior announcement prevents needless damage to the residence by giving the occupant the opportunity to admit the officers peacefully. *Miller*, 357 U.S. at 307, 313. The knock-and-announce rule has also been said to protect against intrusions occasioned by law-enforcement officers' mistakes. See *Ker*, 374 U.S. at 57 (Brennan, J., dissenting) (stating that knock-and-announce rule is based in part on considerations such as possibility that police may be misinformed as to name or address of suspect); *United States* v. *Cantu*, 230 F.3d 148, 151-152 (5th Cir. 2000) (similar).

In *United States* v. *Ramirez*, *supra*, this Court made clear that although one of the interests furthered by the knock-and-announce principle is avoiding needless property damage, that interest does not justify applying a heightened standard for reasonableness in cases where a no-knock entry is forcible and therefore requires some destruction of property. Rather, the reasonableness standard is the same regardless of whether the entry is forcible or non-forcible. 523 U.S. at 69-73.

Accordingly, the Court in *Ramirez* rejected the Ninth Circuit's holding in that case that the standard for determining whether officers may enter without a prior announcement varies according to whether property must be destroyed to effectuate the entry. More specifically, the Court disagreed with the court of appeals that "while a 'mild exigency' is sufficient to justify a no-knock entry that can be accomplished without the destruction of property, 'more specific inferences of exigency are necessary' when property is destroyed." 523 U.S. at 69-70 (quoting *United States* v.

Ramirez, 91 F.3d 1297, 1301 (9th Cir. 1996)). This Court held that whether there is reasonable suspicion to justify a no-knock entry by law enforcement officers "depends in no way on whether police must destroy property in order to enter." 523 U.S. at 71.

B. The Need To Damage Property Does Not Increase The Required Period Of Delay After Officers Knock And Announce Their Presence

Although *Ramirez* involved a no-knock entry, its reasoning is equally applicable here. *Ramirez* reflects a general principle that the need to damage property in order to effectuate an entry to execute a search warrant should not be part of the analysis of whether the entry itself was reasonable. Rather, the dispositive issues in evaluating the timing of an entry are whether admittance has been effectively refused and whether other law enforcement needs render prompt entry reasonable. Cf. *United States* v. *Knapp*, 1 F.3d 1026, 1030 (10th Cir. 1993) (observing that where no exigent circumstances permitted officers to disregard knock-and-announce requirement, "the critical issue is whether the officers were constructively refused admittance under § 3109 by waiting ten to twelve seconds without receiving a response"). Thus, the proper analysis focuses on how long a reasonable officer would wait before concluding that continued delay would be futile, risk frustrating the purposes of the warrant, or expose persons to serious danger, cf. *Richards*, 520 U.S. at 394, not on whether property must be destroyed.[4]

[4] That is not to suggest that property damage never triggers Fourth Amendment concerns. In *Ramirez*, this Court explained that "[e]xcessive or unnecessary destruction of property in the course of a search may violate the Fourth Amendment, even though the entry itself is lawful and the fruits of the search are not subject to suppression." 523 U.S. at 71. Here, however, there is no claim that the officers did any more damage to respondent's property than was required to enter his apartment. In any event, as the Court indicated in *Ramirez*, any such property damage would not support the suppression of evidence. *Ibid.*

The Fourth Amendment and 18 U.S.C. 3109 already protect an occupant's property rights by requiring officers, absent reasonable suspicion justifying immediate entry, to knock and announce themselves before executing a warrant at a residence, thus permitting the occupant to answer the door before any property destruction becomes necessary. See, *e.g.*, *Richards*, 520 U.S. at 393 n.5 ("[T]he common law recognized that individuals should be provided the opportunity to comply with the law and to avoid the destruction of property occasioned by a forcible entry.") (citing *Wilson*, 514 U.S. at 930-932); *Spikes*, 158 F.3d at 925 ("[T]he 'knock and announce' rule serves to respect the sanctity of a person's home by affording notice to those inside so that they may open the door peaceably."). After reasonably concluding that they have been refused admittance, however, officers "may break open any outer or inner door or window of a house, or any part of a house." 18 U.S.C. 3109. Accordingly, when officers have waited a sufficient period after knocking and announcing their presence to allow a person a reasonable opportunity to answer the door, the need to destroy property to effectuate an entry is a consequence of the occupant's failure to open the door. It is not an independent reason for requiring further delay between notice and entry.[5]

[5] By the same token, the fact that an entry could be made without property destruction does not justify a premature entry into a home after announcement. Cf. *Sabbath*, 391 U.S. at 587, 589

C. Requiring Officers To Consider The Need To Damage Property Would Interfere With The Proper Execution Of Warrants

In deciding whether admittance has been constructively refused, officers take into account the specific circumstances they confront. Factors that tend to *increase* the required delay between the officers' announcement and a forcible entry are those that make it reasonable to believe that the occupant will need a longer than usual period of time to respond to the announcement—for example, if the search is at late night or early in the morning, the dwelling is unusually large, or the officers know that the occupant is in an unusual location inside the dwelling. See, *e.g.*, *United States* v. *Gallegos*, 314 F.3d 456, 460 (10th Cir. 2002). In contrast, important countervailing law-enforcement concerns may serve to *truncate* the delay period—for example, a known danger to the officers' or occupant's safety, a potential for the destruction of evidence, or evidence that a suspect is attempting to escape. See, *e.g.*, *United States* v. *Howard*, 961 F.2d 1265, 1267 (7th Cir.), cert. denied, 506 U.S. 882 (1992). Once officers have determined that a forcible entry is necessary, they have already balanced the factors that make it reasonable to delay a given period of time before entering. The need to destroy property during the course of the entry adds nothing to that balancing process. In fact, if officers were automatically required to wait a longer period because of the need to destroy property, it could have the effect of encouraging criminals to barricade their doors or take other actions to increase the amount of property that must be destroyed to effectuate an

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(opening a closed but unlocked door of apartment constituted an unannounced intrusion under 18 U.S.C. 3109).

entry. The result would be additional delays for law enforcement officers and more time for criminals to seek to escape, dispose of evidence, or otherwise resist the search. Such a result is plainly inconsistent with *Ramirez*.

Without even mentioning *Ramirez*, the court of appeals engrafted a property-destruction principle onto the knock-and-announce requirement of the Fourth Amendment and 18 U.S.C. 3109. Indeed, under the court of appeals' approach, the need to destroy property becomes the first and primary inquiry. The court stated that, as an initial matter, "we categorize entries as either forced or non-forced" based upon the need to damage property to effectuate the entry. Pet. App. 6a. After that inquiry, "[t]he reasonableness must *then* be determined in light of the totality of the circumstances surrounding the execution of the warrant." *Ibid.* (emphasis added).

Not only did the Ninth Circuit disregard this Court's holding in *Ramirez* in requiring officers (in category four of the court of appeals' matrix) to wait "an even more substantial amount of time" before forcibly entering a residence in the absence of exigent circumstances, it held (in category two of its matrix) that even where exigent circumstances exist, the need to destroy some property to effectuate an entry "necessitat[es] *more specific inferences of exigency*." Pet. App. 5a-6a (emphasis added). This latter requirement, however, is precisely the novel Ninth Circuit requirement this Court rejected in *Ramirez*. 523 U.S. at 69-70 (quoting 91 F.3d at 1301). The Ninth Circuit stands alone in its focus on property damage. See *LaLonde* v. *County of Riverside*, 204 F.3d 947, 957 (9th Cir. 2000) ("No other circuit followed our property-based exigency rule.").

Its property-driven categorical scheme conflicts with this Court's precedents.

III. THE OFFICERS' ENTRY INTO RESPONDENT'S APARTMENT AFTER KNOCKING AND ANNOUNCING THEIR PRESENCE AND WAITING 15-20 SECONDS WITHOUT HEARING A RESPONSE WAS REASONABLE

The actions of the officers who executed the search warrant on respondent's apartment complied with the Fourth Amendment and 18 U.S.C. 3109. Respondent himself concedes that the officers went to his small apartment at 2 p.m. on a weekday to execute a valid search warrant for drugs, without knowing whether anyone was in the apartment at the time; that the officers "knocked loudly and announced 'Police, search warrant' in a loud authoritative tone"; that the officers did not hear any response; and that they waited at least 15-20 seconds after knocking and announcing before forcibly entering the apartment. Br. in Opp. 3. Respondent also acknowledges that he was in the shower at the time and did not hear the officers knock and announce. *Ibid.* Under such circumstances, the officers acted reasonably and the evidence they obtained during the search of the premises should not be suppressed.

Entries like the one in this case have been routinely upheld by other courts of appeals. For example, in *United States* v. *Lucht*, 18 F.3d 541, 548, 549 (8th Cir.), cert. denied, 513 U.S. 949 (1994), the court of appeals upheld the district court's finding that law enforcement officers acted reasonably when they attempted to execute a warrant to search for methamphetamine at 7 a.m. by knocking and announcing and waiting approximately 20 seconds before forcibly entering the premises. The court explained:

> [T]he [district] court found that [the defendants'] houses were small, the occupants were awake, there was probable cause to believe [the defendants] possessed narcotics, and the officers waited twenty seconds for a response after knocking and announcing their presence and purpose. In these circumstances, the possibility was slight that those within did not hear or could not have responded promptly, if in fact they had desired to do so.

Id. at 549. The Eighth Circuit found no knock-and-announce violation when officers waited for essentially the same period as at issue here, but where the residence was larger and the forcible entry took place early in the morning, when residents are more likely to be asleep or in the shower, rather than in the middle of a weekday afternoon, as in this case.

Similarly, in *United States* v. *Spriggs*, 996 F.2d 320, cert. denied, 510 U.S. 938 (1993), the D.C. Circuit upheld the district court's denial of the defendant's motion to suppress heroin, cash, and drug paraphernalia seized from his apartment during a search that was conducted between 7:30 and 7:45 on a weekday morning. Law enforcement officers forced open the front door of the apartment after waiting approximately 15 seconds. In those circumstances, the court held that "the agents were justified in concluding that they had been constructively refused admittance when the occupants failed to respond within 15 seconds of their announcement." *Id.* at 323; see *United States* v. *Jones*, 133 F.3d 358, 361-362 (5th Cir.) (noting that courts have generally found no violation "when officers have waited more than 5 seconds," and holding that "[i]n drug cases, where drug traffickers may so easily and quickly destroy the evidence of their illegal enter-

prise by simply flushing it down the drain, 15 to 20 seconds is certainly long enough for officers to wait before assuming the worst and making a forced entry"), cert. denied, 523 U.S. 1144 (1998).

Numerous other decisions have upheld delays of 15-20 seconds (or less) in generally similar factual circumstances. See, *e.g.*, *United States* v. *Garcia*, 983 F.2d 1160, 1168 (1st Cir. 1993) (holding that "a wait of ten seconds after knocking combined with an announcement before forced entry, was reasonable" because "[t]he occupants of the apartment were reasonably believed to possess cocaine, a substance that is easily and quickly hidden or destroyed"); *United States* v. *Gatewood*, 60 F.3d 248, 250 (6th Cir.) (concluding that delay of approximately ten seconds was sufficient before entering apartment officers knew to contain cocaine), cert. denied, 516 U.S. 1001 (1995); *United States* v. *Markling*, 7 F.3d 1309, 1318 (7th Cir. 1993) (holding that delay of seven seconds was sufficient before forcing entry where "[t]here was no noise coming from the apartment * * * that would have made it difficult for [defendant] to hear" the officers' announcement, the "motel room was small," and informants indicated that defendant "was likely to flush the cocaine * * * down the toilet"); *United States* v. *Goodson*, 165 F.3d 610, 612, 614 (8th Cir.) (holding that delay of 20 seconds before forcing entry did not violate Fourth Amendment where officers searched one-story ranch house for crack cocaine at 1:44 a.m.), cert. denied, 527 U.S. 1030 (1999); *United States* v. *Jenkins*, 175 F.3d 1208, 1215 (10th Cir.) (upholding delay of 14 to 20 seconds before forcing entry where search of defendant's residence took place at 10 a.m.), cert. denied, 528 U.S. 913 (1999).

Indeed, the Ninth Circuit itself has candidly acknowledged that its decision in this case cannot be reconciled with either its own prior decisions or the decisions of other courts of appeals, all of which have upheld the constitutionality of forcible entries where the officers waited 10-20 seconds after knocking and announcing. *United States* v. *Chavez-Miranda*, 306 F.3d 973, 981-982 n.7 (2002) ("*Banks* appears to be a departure from our prior decisions. As noted by the trial court, we have found a 10 to 20 second wait to be reasonable in similar circumstances, albeit when the police heard sounds after the knock and announcement. * * * Several other circuits have upheld similar waits even without noise being heard."), cert. denied, 123 S. Ct. 1317 (2003). Consistent with this Court's precedents and those of all other courts of appeals, it is clear that, based on the totality of circumstances, the officers acted reasonably and in accord with the Fourth Amendment and 18 U.S.C. 3109 by waiting 15-20 seconds after knocking and announcing their presence before forcibly entering respondent's apartment.

IV. SUPPRESSION OF EVIDENCE IN THIS CASE WOULD IMPOSE UNJUSTIFIED COSTS ON SOCIETY

Even if law enforcement officers had violated the knock-and-announce rule in this case, the suppression of evidence ordered by the court of appeals would be an unjustified remedy, because any knock-and-announce violation did not harm respondent's constitutionally protected interests. As this Court explained in *Nix* v. *Williams*, 467 U.S. 431, 443 (1984), "the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting

the police in the same, not a *worse*, position that they would have been in if no police error or misconduct had occurred." See *Segura* v. *United States*, 468 U.S. 796, 814 (1984) (rejecting suppression based on allegedly illegal entry because "[h]ad police never entered the apartment, but instead conducted a perimeter stakeout to prevent anyone from entering the apartment and destroying evidence, the contraband now challenged would have been discovered and seized precisely as it was here"); *United States* v. *Payner*, 447 U.S. 727, 734 (1980) (noting that because "the suppression of probative but tainted evidence exacts a costly toll upon the ability of courts to ascertain the truth in a criminal case," the exclusionary rule "has been restricted to those areas where its remedial objectives are most efficaciously served") (citation omitted); see also *United States* v. *Espinoza*, 256 F.3d 718, 725 (7th Cir. 2001) ("[T]he exclusionary rule should be limited only to those instances where the constitutional violation has caused actual harm to the interest * * * that the rights protect.") (internal quotation marks omitted), cert. denied, 534 U.S. 1105 (2002).

Here, as the dissent below emphasized (Pet. App. 14a), the record demonstrates that the alleged knock-and-announce violation did no harm whatsoever to any of respondent's protected interests. Indeed, it is essentially undisputed that the events related to the search of respondent's apartment would not have unfolded any differently if the officers had waited longer before entering or had knocked a second time. Respondent concedes that he was in the process of showering when the officers approached his door, and that he therefore did not hear them knock and announce. Br. in Opp. 3. Even if the officers had delayed entry for a brief time or repeated their announcement, respondent

still would not have heard them and so still would not have admitted them to execute the warrant. Accordingly, *none* of the interests furthered by the knock-and-announce principle—protecting the privacy of occupants against sudden intrusion, safeguarding law enforcement officers from being mistaken as unlawful intruders, and avoiding needless property damage—would be served by suppressing the evidence obtained in the search of respondent's apartment, since *none* of those interests was affected by the officers' forcible entry. Where, as here, there is no harm to a defendant's interests protected by the knock-and-announce requirement, society's vital interests in combating crime—in particular drug trafficking and related violence—should not be sacrificed by application of the exclusionary rule.

Indeed, as reflected in the inevitable-discovery and independent-source exceptions to the exclusionary rule, this Court has generally authorized suppression only where the constitutional violation is causally connected to the discovery of the excluded evidence. See *Nix*, 467 U.S. at 443-444; *Murray* v. *United States*, 487 U.S. 533, 537-542 (1988). Here, for the reasons described above, no such causal connection exists. The officers would have forcibly entered respondent's apartment and obtained the same evidence under the warrant-authorized search regardless of the violation found by the court of appeals. As this Court explained in *Segura*, in connection with the "fruit of poisonous tree" doctrine:

> Suppression is not justified unless 'the challenged evidence is in some sense the product of illegal governmental activity.' The illegal entry into petitioners' apartment did not contribute in any way to discovery of the evidence seized under the warrant;

it is clear, therefore, that not even the threshold 'but for' requirement was met in this case.

468 U.S. at 815 (citation omitted) (quoting *United States* v. *Crews*, 445 U.S. 463, 471 (1980)); see *New York* v. *Harris*, 495 U.S. 14, 19 (1990). Cf. *Ker*, 374 U.S. at 39 (plurality opinion) ("[N]o basic constitutional guarantees are violated because an officer succeeds in getting to a place where he is entitled to be more quickly than he would, had he complied with [the state statute].") (citation omitted).

The courts of appeals have reached different results on whether inevitable-discovery and independent-source principles authorize the admission of evidence seized under warrant after a violation of the knock-and-announce rule. Compare, *e.g.*, *United States* v. *Langford*, 314 F.3d 892, 894 (7th Cir. 2002) ("[I]t is hard to understand how the discovery of evidence inside a house could be anything but 'inevitable' once the police arrive with a warrant.") (citation omitted), and *United States* v. *Jones*, 214 F.3d 836, 838 (7th Cir. 2000) ("A warrant authorized the entry, so seizure of evidence was inevitable."), with *United States* v. *Marts*, 986 F.2d 1216, 1219-1220 (8th Cir. 1993) (rejecting in dicta application of independent-source doctrine to violation of knock-and-announce rule), and *United States* v. *Dice*, 200 F.3d 978, 985 (6th Cir. 2000) (rejecting inevitable-discovery exception in knock-and-announce violation case where there was no evidence that a second, independent investigation would have led to the evidence).[6]

---

[6] The Sixth Circuit's reasoning in *Dice* appears to be in tension with that court's own prior holding in *United States* v. *Kennedy*, 61 F.3d 494, 499-500 (1995), cert. denied, 517 U.S. 1119 (1996), that "an alternate, independent line of investigation is not required for the inevitable discovery exception to apply." Cf. *United States* v. *Koubriti*, 199 F. Supp. 2d 656, 671 n.10 (E.D. Mich. 2002) (noting intra-circuit conflict in authority created by *Dice* and *Kennedy*).

Those established exceptions to the exclusionary rule should be held applicable to cases where the same evidence would have been discovered in the warrant-authorized search even if the officers had complied with the knock-and-announce rule. But even without those doctrines, in this case, the violation (if any) not only lacks any causal connection to the discovery of the excluded evidence, but also does not harm any of the interests protected by the Fourth Amendment. In that circumstance, there is no justification for suppression.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 02-473

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In the Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

LASHAWN LOWELL BANKS,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF ON THE MERITS

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ISSUE

Whether the Fourth Amendment reasonableness standard, which incorporates the common-law knock and announce rule, also incorporates the refusal component, which requires law enforcement personnel to provide the occupant with a reasonable opportunity to respond before force can be used.

The respondent, LaShawn Lowell Banks, by and through his appointed counsel, Randall J. Roske, respectfully submits his brief in answer on the merits to the Solicitor General of the United States of America's brief attacking judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 282 F.3d 699 (9th Cir. 2002). The district court's order denying respondent's motion to suppress is unreported (Pet. App. 20a-21a), as are the recommendation and report of the magistrate judge advising the district judge to deny respondent's suppression motion after evidentiary hearing (*Id*. at 22a-32a).

JURISDICTION

Respondent concedes that the request for this Court to accept jurisdiction of this case has been properly invoked under Title 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Title 18 of the United States Code Section 3109 states:

> *Breaking doors or windows for entry or exit*:
>
> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

COUNTER STATEMENT

Respondent was indicted for possession of a controlled substance with intent to distribute, a violation of Title 21 U.S.C. §841(a)(1), (count one) and with possession of a firearm as an unlawful drug user, a violation of Title 18 U.S.C. §922(g)(3). (J.A. 11-12). Respondent filed a motion to suppress the evidence obtained in violation of the Fourth Amendment and the "knock and announce" statute, Title 18 U.S.C. §3109 (J.A. 13-22). An evidentiary hearing was held by the magistrate judge who issued a recommendation and report to the district court that the respondent's motion be denied (Pet. App. 22a-32a). The district court judge thereafter denied respondent's motion (Pet. App. 20-21a). Respondent plead guilty to both counts of the indictment reserving the right to appeal the denial of his suppression

motion. Respondent was sentenced to serve 11 years and three months by the district court. A timely appeal was taken to the Court of Appeals for the Ninth Circuit. The court of appeals reversed the district court's denial of the suppression motion on Fourth Amendment grounds after careful examination of all the undisputed facts of this case (Pet. App. 1a-19a). The court of appeals recognized that the forcible entry here was made in the absence of exigent circumstances (Pet. App. 1a-8a). The court of appeals examined all relevant factors and concluded that under the facts unique to this case, the officers executing the warrant had failed to wait a sufficient amount of time before inferring a refusal of admittance. *Id.*

1. The facts adduced below are as follows:

Sometime in early July of 1998, a joint state and federal drug task force (the North Las Vegas Federal Drug Task Force) received word from a confidential informant that a person known as "Shakes" was selling cocaine and the informant believed he could make a controlled purchase (J.A. 24). The informant related that "Shakes" lived at 1404 Henry Drive, apartment D, in Las Vegas, Nevada. *Id.* Officer Crespo of the North Las Vegas Police Department arranged for $200 from the narcotics buy fund to have the informant make a controlled buy. He then searched the informant for money and drugs before supplying the $200 to the informant (J.A. 25). Officer Crespo then drove him to the 1404 Henry Drive apartment. *Id.* The informant then went into apartment "D" and returned a short while later with two large off-white rocks of cocaine. The informant identified the seller as "Shakes." (J.A. 24). No further identifying information was provided. *Id.*

Officer Crespo sought a search warrant for 1404 Henry Drive, apartment D on July 8, 1998 (J.A. 23-27). This warrant was authorized by the justice of the peace on the same day. The warrant described the premises to be searched as an upstairs apartment in a four apartment building (J.A. 23).

On July 15, 1998, at 2 p.m. the members of the joint task force assembled to raid respondent's apartment (J.A. 73-74). Officer Crespo, along with members of the SWAT team, were stationed at the entrance to apartment D (J.A. 73). The members of the SWAT team were wearing tactical assault garb, including hoods or masks to disguise their identity (J.A. 80). The entry team was armed with fully automatic weaponry (J.A. 79-80). FBI Agent Tomasso was stationed at the rear of the apartment building and apparently could hear the entry team (J.A. 97). The officers executing the warrant did not know whether anyone was in the apartment (J.A. 48). Officer Crespo knocked loudly and announced "Police, search warrant" in a loud authoritative tone (J.A. 75). Officer Crespo did not hear anything back. *Id.* Officer Crespo waited "at least 15 seconds" before ramming open the apartment door. *Id.* FBI Agent Tomasso, who was stationed at the rear of the apartment, opined that the time interval was "I think twenty seconds, maybe." (J.A. 97). When the door flew open, respondent was found wet, soapy and naked a few steps from the bathroom (J.A. 76).

Respondent testified that he was taking a shower when he heard a loud "boom." (J.A. 124-125). He heard no knock or announcement, but did hear a loud noise of the battering ram (J.A. 125). He turned off the water and stepped out of the bathroom when in came rushing masked men in black outfits armed with guns (J.A. 135). Respondent was immediately proned out, face down by an armed man. He did not know whether the man was a robber or a police officer (J.A. 143).

Thereafter, respondent was handcuffed and taken naked to the kitchen table for interrogation (J.A. 125). Meanwhile, the SWAT team conducted the search of his apartment (J.A. 92-93). Drugs, weapons and other evidence were located in respondent's apartment. Respondent was the sole occupant of apartment D, at the time of the execution of the search warrant.

2. A majority of the judges acting as a three judge panel reversed the district court's denial of respondent's motion to suppress.[1] The majority opinion was written by Judge Henry A. Politz, a senior judge of the Fifth Circuit Court of Appeals sitting by designation in the Ninth Circuit Court of Appeals (Pet. App. 1a-19a).

The Ninth Circuit Court cited four general categories of knock and announce cases (see Pet. Br. at 5). Petitioner states: "The majority set forth four categories of knock and announce cases, each requiring a different period of delay before an officer may enter a residence after knocking and receiving no response." In the decision below, *United States v. Banks*, 282 F.3d 699 at 705, (9th Cir. 2002), (App. 5a) the court stated:

> (1) entries in which exigent circumstances exist and non-forcible entry is possible, permitting entry to be made simultaneously with or shortly after announcement; (2) entries in which exigent circumstances exist and forced entry by destruction of property is required, necessitating more specific

---

[1] The suppression motion raised Fifth and Sixth Amendment issues which were rejected by the court of appeals, and are not the subject of the case before this Court.

> inferences of exigency; (3) entries in which no exigent circumstances exist and non-forcible entry is possible, requiring an explicit refusal of admittance or a lapse of a significant amount of time; and (4) entries in which no exigent circumstances exist and forced entry by destruction of property is required, mandating an explicit refusal of admittance or lapse of an even more substantial amount of time.

The majority in *Banks* did not refer to the four basic categories as setting "a different period of delay before an officer may enter a residence after knocking and announcing and receiving no response" as argued by the petitioner (See Pet. Br. at 4). The majority referred to the consideration of the four basic categories as "aids in the resolution of the essential question whether the entry made herein was reasonable under the circumstances" under Title 18 U.S.C. §3109 (See *Banks* 282 F.3d at 705; App. 6a). The majority explicitly noted "'there are no set rules as to the time an officer must wait before using force to enter a house; the answer will depend on the circumstances of each case'" [See, *Banks* at 704-705; App 5a; c.f. *McClure v. United States*, 332 F.2d 19, 22 (9th Cir. 1964)]. The "four categories of entries" under Title 18 U.S.C. §3109 referred to by the majority in *Banks* are distilled from the case of *Bustamonte-Gamez*, 488 F.2d 4, 9 (9th Cir. 1973), and is an effort to take into account the interests served by Title 18 U.S.C. §3109 in "(a) reducing the risk of harm to both the officer and the occupants of the house to be entered; (b) helping to prevent the unnecessary destruction of private property; and (c) symbolizing respect for individual privacy summarized in the adage that 'a man's home is his castle.'" *Banks*, 282 F.3d at 705; App. 5a, citing *Bustamonte-Gamez*, 488 F.2d 4, 9 (9th Cir. 1973), quoting *Miller v. United States*, 357 U.S. 301, 307, 2L.Ed.2d 1332, 78 S.Ct. 1190 (1958).

The majority in *Banks* noted that the officer's entry was made after knocking and announcing their authority and purpose. The question presented in *Banks* is whether the officers could reasonably infer a refusal of admittance from the passage of a mere 15-20 seconds under a totality of the circumstances surrounding the execution of the warrant (See, *Banks*, 282 F.3d at 705; App. 7a).

The majority in *Banks* concluded, after a careful examination of the record, no exigent circumstances existed (see, 282 F.3d at 704, ft.nt. 3; App. 6a). Exigent circumstances exist when "'there [is] a likelihood that the occupants [will] attempt to escape, resist, destroy evidence, or harm someone within . . . '" [Id., c.f. *United States v. McConney*, 728 F.2d 1195, 1204-05 (9th Cir. 1984) (en banc opinion)]. The petitioner notes the *Banks*' majority's conclusion that no exigent circumstances specific to the case existed. The *Banks* majority opinion articulated a series of nonexclusive factors to determine whether, under the totality of the circumstances, the duration of the officer's pause was reasonable (282 F.3d at 704; App. *infra* 6a-7a). These factors are:

> (a) size of residence; (b) location of the residence; (c) location of the officers in relation to the main living areas of the residence (d) time of day; (e) the nature of the suspected offense; (f) evidence demonstrating the suspect's guilt; (g) suspect's prior convictions and, if any, the type of offence for which he was convicted; and (h) any other observations triggering the senses of the officers that reasonably would lead one to believe that immediate entry was necessary. (*Id*. App. 6a-7a).

The majority opinion in *Banks* conducted the following analysis:

In the case before us, the officers knocked once and announced their purpose. The officers heard no sound coming from the small apartment that suggested that an occupant was moving away from the door, or doing anything else that would suggest a refusal of admittance. We know from the record sounds were transmitted relatively easily for [FBI Agent] Tomasso, waiting outside at the rear of the apartment, heard Officer Crespo's knock at the front door. Yet none of the officers testified that they heard any sound coming from within the apartment. There was nothing else that triggered the officers' senses, and there were no exigent circumstances warranting a waiver of the reasonable delay. The officers had no specific knowledge of any facts or reasonable expectations from which they could reasonably have believed that entry into Banks' residence would pose any risk greater than the ordinary danger of executing a search warrant on a private residence.

Because the officers were not affirmatively granted or denied permission [to enter], they were required to delay acting for a sufficient period of time before they could reasonably conclude that they impliedly had been denied admittance. After pausing a maximum of fifteen to twenty seconds, the officers forced entry. Banks came out of his shower upon hearing the sound of his door being forced open, and stumbled into the hallway concerned that his apartment was being invaded. Upon entering, the officers found Banks naked, wet and soapy from his shower. Under these circumstances, we are not prepared to conclude that the delay of fifteen to twenty seconds after a single knock and announcement before forced entry was, without an affirmative denial of admission or other

exigent circumstances, sufficient in duration to satisfy the constitutional safeguards.

Banks, majority opinion, 282 F.3d at 705-706; App. *infra* 7a-8a). Several facts not mentioned by the majority opinion, are that the officers had no knowledge of any other occupant of the apartment, except the person identified as "Shakes," and that at the time of the warrant's execution the officers were apparently unsure of whether anyone was, in fact, home. There was no evidence adduced that surveillance was established anytime except just prior to the warrant's execution.

The petitioner concedes that the majority opinion in *Banks* "did not indicate how much delay before entering was necessary to satisfy the Fourth Amendment." (Pet. Br. 7). The dissenting judge, Judge Fisher, in his opinion, criticized the majority opinion in *Banks* as neglecting to address all of the factors it identified as relevant to the inquiry. Judge Fisher was referring to the nonexclusive list of factors set forth by the majority opinion. 282 F.2d at 705; App. *infra* 14a-19a). Judge Fisher specifically identified, as "discounted factors:" (a) [the] size of the residence;" "(c) location of the officers in relation to the main living or sleeping areas of the residence;" and "(e) [the] nature of the suspected offense." Judge Fisher, in his dissent, admits "this case is a close call" and acknowledges "it is disquieting to visualize Banks' shock and embarrassment as he emerged naked and still soapy from his shower and confronted the officers who had just burst through his front door." (282 F.3d at 707; App. *infra* 11a). The dissenting judge's claim that the majority opinion failed to give weight to the factors identified as the size of the residence, location of the officers and the nature of the offense is offset by the other facts specific to *Banks*. Even in a small apartment, an individual who is in the shower or using the

bathroom cannot be *reasonably* expected to answer the door in twenty seconds or less. Law enforcement officers set the timing of their raids. They are calculated to take the occupants (or here the sole occupant) off guard.

It is conceded by Judge Fisher in his dissent that, "there is no Ninth Circuit precedent directly on point," (282 F.3d at 709; Pet. App. 16a). The dissenting judge then cites cases outside the controlling circuit, to justify entries anywhere from 10 to 20 seconds after the knock. Without addressing each case here individually, these cases all have significantly different fact patterns making them distinguishable from the case at bar. Petitioner has seized upon Judge Fisher's comment that the majority's opinion provides no meaningful guidance to law enforcement officers (Pet. Br. 7). This Court's cases teach that there are no set rules for what is a reasonable delay under the Fourth Amendment principles. Where the police are confronted with no explicit refusals of admittance by a sole occupant of a dwelling, it is necessary for them to pause to consider that the person may be engaged in a private activity which society recognizes would prevent an immediate response to the door.

A. The *Banks* Majority Opinion is Consistent With This Court's Precedent.

The decision of the majority in *Banks* does not create a "rigid," "categorical scheme" to Fourth Amendment analysis as claimed by Petitioner (Pet. Br. 7). The "four categories" identified in the majority opinion in *Banks* are intended to be "aids in the resolution of the essential question whether the entry made herein was reasonable under the circumstances." (*Banks*, 282 F.3d at 704; App. *infra* 5a-6a). The guidance offered by the *Banks* majority was merely an analytical distillation of cases interpreting the interests served by the

knock and announce statute, Title 18 U.S.C. §3109 (*Banks*, 282 F.3d at 705; App. *infra* 6a). The petitioner overstates the significance of the guidelines and glosses over the fact that the majority opinion utilized a *totality of the circumstances* test to determine reasonableness under Fourth Amendment standards (*Banks*, 282 F.3d at 705; App. *infra* 6a). There is nothing in the *Banks* opinion which mandates a rigid rule of announcement in derogation of this Court's opinion in *Wilson v. Arkansas*, 514 U.S. 927, 934 (1995) (Pet. Br. 8). In *Wilson*, this Court addressed the Arkansas Supreme Court's finding that there is no authority for the proposition that the common law knock and announce principle formed a part of the Fourth Amendment reasonableness inquiry. In *Wilson*, this Court was presented with a state court prosecution predicated on evidence seized on a search warrant executed by the police. The facts there involved an informant who made a series of purchases of drugs from Ms. Wilson. On the last drug buy, Ms. Wilson waved a gun in the informant's face and threatened to kill her if she was working for the police. Search warrants were obtained and the police executed the warrant without making any knock and announcement. After entering, the police found Ms. Wilson in the bathroom flushing drugs down the toilet. Ms. Wilson filed a motion to suppress claiming, among other things, that the officers executing the warrant failed to knock and announce their purpose. This Court, in a unanimous opinion, authored by Justice Thomas, reversed the Arkansas Supreme Court's affirmance and remanded the matter for determination below whether the search might be constitutionally defective or if law enforcement interests may establish the reasonableness of an unannounced entry. *Wilson,* 514 U.S. at 936. The remand was made despite the State of Arkansas, and the Solicitor General's argument that the record sufficiently justified the entry because of the reasonable belief, by the officers, that a prior announcement would place them in peril and the

potential that evidence would be destroyed (*Wilson*, 514 U.S. at 937).

The respondent argues that "by making the amount of time that officers must wait vary according to whether execution of a warrant requires property damage" is at odds with this Court's decision in *United States v. Ramirez*, 523 U.S. 65, 71 (1998) (Pet. Br. 8). First, to the extent that the majority opinion in *Banks* refers to a guideline addressing absence of property damage, the holding does not turn on this factor because *Banks* involves the damage of property. The distinction made in the "Guidelines" discussed by the majority opinion in *Banks* does not necessarily place the decision at odds with this Court's decision in *Ramirez*. This Court's decision in the *Ramirez* case teaches that the Fourth Amendment does not hold officers to an enhanced or higher standard of showing of exigent circumstances where a "no knock" entry results in the destruction of property. 523 U.S. 65 at 71. The insistence on a heightened showing of exigency was the basis of the decision by the court of appeals that the fruits of the search were a result of a Fourth Amendment violation. In *Ramirez*, the Chief Justice delivered a unanimous opinion of the Court. The *Ramirez* case involved a police search for a violent escapee who was believed to be at the Ramirez residence. The escapee, according to an informant, had guns and drugs stashed in the garage. The Chief Justice, speaking for this Court, rejected the notion that a heightened standard of exigency applies to a no knock if the entry requires destruction of property. The instant case addresses a different issue under Title 18 U.S.C. §3109, which is whether under the totality of the circumstances the officers paused sufficiently before inferring a refusal of admittance. The *Ramirez* case involved particularized facts which the officers used to form a reasonable suspicion that knocking and announcing would be "dangerous" and

"destructive" to the purposes of the investigation. However, to the extent the "Guidelines" cited in *Banks* are at odds with the *Ramirez* decision, they are *dicta*. The Guidelines in *Banks* do not affect the outcome of the case, and the over-arching question which is: whether the officer had paused sufficiently under a reasonableness standard of the Fourth Amendment before making a forcible entry. This is because in *Banks*, there were no exigent circumstances present. There were no facts giving rise to a particularized suspicion "heightened" or not.

The "four categories" pointed out by the *Banks* court is an effort by the Ninth Circuit to classify the various kinds of entries by police and require a higher standard of exigencies where destruction of property occurs, and there is a claim of a knock and announce violation. This is the Ninth Circuit Court's effort to give a higher meaning to the Fourth Amendment, and the knock and announce rule which it incorporates. This analysis does not explicitly reference the common-law at the time of the adoption of the Constitution. Nonetheless, the Ninth Circuit has attempted to strike a balance between the needs of law enforcement, while at the same time, according the kind of core protections that existed at common-law.

In *Wilson v. Arkansas*, 514 U.S. 927 (1995), Justice Thomas, speaking for a unanimous court, held that "the common law 'knock and announce' principle forms a part of the reasonableness inquiry under the Fourth Amendment." (514 U.S. at 927). In *Wilson*, the issue at bar was whether the "knock and announce" rule is constitutionally mandated by the Fourth Amendment. Justice Thomas used a historical analysis to come to the conclusion that the knock and announce rule was a well established principle at common-law. In one of the earliest reported cases at the King's Bench

(1603), *Semayne's Case*, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194-196, the knock and announce rule is cited as well established principle of common-law. In *Wilson*, Justice Thomas referred to the *Semayne's* case as restating an already well established common-law rule requiring a knock and announcement before a breaking or destruction of a dwelling can occur. "But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors. . . ., for the law without a default in the owner abhors the destruction or breaking of any house (which is for the habitation and safety of man) by which great damage and inconvenience might ensure to the party, when no default is in him; for perhaps he did not know the process, of which, if he had notice, it is presumed that he would obey it. . ." Ibid, 77 Eng. Rep. at 195-196. *Wilson*, 514 U.S. at 931-932, 115 S.Ct. at 1916-1917, 131 L.Ed2d at 981. Justice Thomas "looked to the traditional protections against unreasonable searches and seizures afforded by common law at the time of the framing" to determine the scope of the Fourth Amendment. *Wilson*, 514 U.S. at 931, 115 S.Ct. at 1916, 131 L.Ed2d at 981. Justice Thomas noted that the knock and announce rule finds its earliest reference in a statute enacted by Parliament in 1275 which was apparently a restatement of the established law common to all England. [3 Edw.I, ch 17, in the Statutes at large from Magna Carta to Hen 6 (O. Ruffhead ed. 1769); (*Wilson Id.* At ft.nt 2)].

Justice Thomas in *Wilson* also quoted *Lee v. Gansell*, Lofft 374, 381-382, 98 Eng. Rep. 700, 705 (K.B. 1774) for the proposition that "'as to the outer door, the law is now clearly taken' that it is privileged; but the door may be broken 'when the due notification and demand has been made **and refused**.'" (Emphasis supplied). *Wilson,* 514 U.S. at 932, 115 S.Ct. at 1917, 131 L.Ed 2d 981. The clearly established rule at common law was that a knock and announcement were

required, and further, that a refusal was also required before a breaking could be made. Sir Matthew Hale (as noted by Justice Thomas in *Wilson*) wrote the "'constant practice' at common law was that 'the officer may break open the door, if he be sure the offender is there, if after acquainting them of the business, the demanding the prisoner, he refuses to open the door.'" (514 U.S. at 932, 115 S.Ct at 1917, 131 L.Ed 2d at 981).

The problem which the lower courts have been left to struggle with is this; the *Wilson* court found that the notice requirement of the knock and announce rule to be incorporated into the Fourth Amendment reasonableness standard, but no guidance as to the refusal component was provided. Therefore, lower courts generally, have been left on their own to attempt to determine where the balance should be struck where the notice requirement has been complied with, and an almost contemporaneous entry is made. This has resulted in many lower courts using a "stopwatch approach" upholding entries where no refusal occurs. For instance, the Seventh Circuit in *United States v. Markling*, 7 F.3d 1309 (7th Cir. 1993) has upheld a forced entry of a motel room in as little as seven seconds between the announcement. In *United States v. Knapp*, 1 F.3d 1026 (10th Cir. 1993) a forcible entry was made on a residence where the elapsed time between announcement and entry was between 10 and 12 seconds, even though the occupant of the home was an **amputee**. In *Knapp*, the Tenth Circuit cited approvingly, a District of Columbia case, *United States v. Ruminer*, 786 F.2d at 383-384 upholding a forcible entry after announcement in a mere "five to ten seconds." In *Wilson*, the Solicitor General opposed in the recognition that the Fourth Amendment reasonableness standard as incorporating the knock and announce requirements. In this case the Solicitor General desires to eviscerate fundamental Fourth Amendment rights by having

this Honorable Court render the refusal component of the knock and announce rule to meaningless ceremony (i.e., knock, announce, break and enter). If law enforcement can knock and announce without pausing for a meaningful period of time before breaking and entering, then the knock and announce rule can be rendered a complete nullity.

Law Professor, Traci Maclin, has carefully analyzed this Court's decisions applying the lessons of history in the area of the Fourth Amendment. Professor Maclin notes that in *Wilson*, the Court was silent on the refusal component of the common law knock and announce rule. 82 B.U.L. Rev. at 909.[2] Professor Maclin however, noted that the *Wilson* court was not strictly required to address the refusal component of the knock and announce rule, under the facts of that case. Professor Maclin wisely commented that:

> severing the refusal component from the notice component defeats the purpose behind the rule. The goals of the announcement rule-minimizing the chance of violence, protecting the home's privacy, and preventing unnecessary physical damage to the home will not be achieved if the homeowner is not given a reasonable opportunity to open his front door. Both halves of the rule must be followed to achieve its constitutional goals.
> 82 B.U.L. Rev. at 907-908.

Professor Maclin also points out that in his research at the time of the framing of the Constitution, American law

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[2] Let Sleeping Dogs Lie: Why the Supreme Court Should Leave Fourth Amendment History Unabridged. 82 B.U.L. Rev. 895 (October 2002).

recognized **no** exceptions to the announcement rule, even for cases involving officer safety or destruction of evidence (82 B.U.L. Rev. at 912-193). Yet, the *Wilson* decision discusses the knock and announce rule as a flexible rule where "in some circumstances an officer's unannounced entry into a home might be unreasonable." *Wilson*, 514 U.S. at 934, 115, S.Ct. at 1918, 131 L.Ed2d at 982. This proposition emboldens the Solicitor General to believe that this Court is prepared to make the rule's enforcement the exception, and its exceptions, the rule. Yet, this is not what the law common to all England was at the time the Constitution was framed, and it was not the law of our land in its infancy. The Solicitor General, on behalf of law enforcement, seeks to tip the balance of the scales of justice heavily in their favor. We are perilously close to losing the very fundamental rights envisioned by the founding fathers for posterity. What is at stake here are the rights of every citizen, not just the next seven years of a young black man's life. In those cases where law enforcement must knock and announce, must they pause a reasonable period of time before breaking and entering? The sad truth is that there are a significant number of dwellings searched in error. The rule of pausing may provide just the additional measure of time to prevent an innocent occupant from being subjected to a domestic variation of state sponsored terrorism. Stories in the media of innocent citizens being terrorized by erroneous searches demonstrate this. In Boston, a retired reverend's home was erroneously searched by law enforcement who sufficiently terrorized the man that the died of a heart attack.[3] The common use of "SWAT" police teams

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[3] In Boston, Massachusetts, on March 26, 1994, 13 heavily armed SWAT team officers slammed down the door of retired Reverend Accelynne Williams and chased him through his home. The 75 year old Reverend fled into the bedroom where the

(as was the case in *Banks*) adds the new dimension of terror in the way law enforcement conducts its business. This use of ski masks to hide the identity of the intruders does nothing to protect the officers, but what it does accomplish, most effectively, is to strike terror in the hearts of men. In *United States v. Becker*, 23 F.3d 1537 at 1549 (9th Cir. 1994), that court stated more eloquently that this author could, that:

> The protection offered by the Fourth Amendment and by our law does not exhaust itself once a warrant is obtained. The concern for privacy, the safety, and the property of our citizens continues and is reflected in the knock and announce requirements. It finds

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police followed him in hot pursuit and knocked in that door. The Reverend was cuffed and was so traumatized by the ordeal that he began vomiting. He later died of heart failure. The officers were in possession of a no knock search warrant for drugs and had mistakenly raided the Reverend's apartment and not the apartment one floor above. No drugs were found. (See, *The Boston Globe*, Sunday Edition, March 27, 1994.) In a follow up article critical of the police procedures, it was pointed out that had the Reverend survived, the matter would have gone unnoticed.

Another erroneous search which did garner media attention in Sixty Minutes, was the case of Don Carlson, an executive for a Fortune 500 company. On the night of August 25, 1992, Mr. Carlson was asleep when narcotics officers made an unannounced entry. Mr. Carlson heard the intrusion and called down the hall "Who's there?" Receiving no answer, and aware intruders were present, he tried calling 911. Then he went for a hand gun and shot it toward the door. Fire was returned and Mr. Carlson was shot in the leg. He staggered back to his bedroom and collapsed. He was shot two more times, then taken into custody. A search of his home revealed no drugs. CBS News, *60 Minutes*, Vol. XXV, No. 27, at 6-7 (Mar. 28, 1993).

> expression in the knock and announce statute . . .
> The fear of smashing in the doors by government agents is based upon much more than a concern that our privacy will be disturbed. It is based upon the concern for our safety and the safety of our families. Indeed, the minions of dictators do not kick the doors for the mere purpose of satisfying some voyeuristic desire to peer around and go about their business. Something much more malevolent and dangerous is afoot when they take those actions. It is that which strikes terror into the hearts of their victims. The Fourth Amendment protects us from that fear as much as it protects our privacy.

In *Banks*, a search was conducted in the afternoon. In most communities it might be surmised that its citizens would be awake. Yet, Las Vegas is known the world over as a "twenty four hour" town. Private activities such as bathing, showering, sleeping and the like, can occur at any hour of the day. Another core purpose served by a meaningful pause between announcement and entry is that it provides the occupant an opportunity to avoid suffering from unnecessary public exposure of private activities. Here, Mr. Banks was showering, an activity almost anyone would consider private. In *McDonald v. United States*, 335 U.S. 451, 460,61, 69 S.Ct. 191, 93 L.Ed. 153 (1948), Justice Jackson noted that requiring officers to wait following their announcement may well permit some persons to put their affairs in order. For Mr. Banks this would have at least afforded him the opportunity to maintain some shred of dignity when confronting the officers.

The Solicitor General, in his brief, asserts that *Banks* creates uncertainty as to how much additional delay is "sufficient" to satisfy constitutional safeguards of the Fourth

Amendment (Pet. Br. 8). The Solicitor General also complains that the *Banks* decision creates a "rigid, complex, and confusing scheme." (Id.) However, the common-law knock and announce rule is a model of simplicity and predictability. At common-law, law enforcement officers were required to pause until a refusal occurred. This meant perhaps repeated announcements were necessary before a refusal was obtained. Clearly, this kind of predictability is not desired by the Solicitor General or law enforcement, whose chief concern is the most efficient enforcement of the penal statutes. Yet, as a free society we must have constitutional constraints on police power, or we will find our failure to heed the lessons of history the creation of a home grown police state. The refusal component of the common-law knock and announce rule provides the appropriate protection for privacy concerns. As Professor Maclin notes, it is the missing half of the knock and announce rule, that gives meaning to the whole.

The *Banks* decision is in harmony with *Richards v. Wisconsin*, 520 U.S. 385, 117 S.Ct. 1416, 137 L.Ed.2d 615 (1997). In *Richards*, this Court was confronted with a state court sanctioned blanket exception to the knock and announce requirement under common-law principles. In *Richards*, the police executed a search warrant on a motel room in connection with a drug investigation. The State Supreme Court adopted a *per se* rule that police officers are never required to knock and announce when executing a warrant in a felony drug investigation. The rationale for this rule of the State Supreme Court was based upon generalizations about "today's drug culture." Justice Stevens delivered the unanimous decision of this Court, while affirming that under facts specific to the case, held that there was no constitutional violation, this Court reaffirmed the principle that *specific* information of exigent circumstances may justify dispensing

with the knock and announce rule, generalized concerns of dangerousness or destruction of evidence do not. 520 U.S. at 392. This Court in *Richards*, reaffirmed the need for *case by case* evaluation of the manner in which a search is conducted. Justice Stevens in footnote 4 stated:

> It is always somewhat dangerous to ground exceptions to constitutional protections in the social norms of a given historical moment. The purpose of the Fourth Amendment's requirement of reasonableness "is to preserve that degree of respect for the privacy of persons and the inviolability of their property that existed when the provision was adopted - - even if a later, less virtuous age should become accustomed to considering all sorts of intrusion 'reasonable.'" *Minnesota v. Dickerson*, 508 U.S. 366, 380, 124 L.Ed.2d 334, 113 S.Ct. 2130 (1993) (Scalia, J., concurring). 520 U.S. at 393.

A reading of the *Richards'* case reflects that it was the state and petitioner who were urging this Court to adopt a rigid rule or blanket exception dispensing with the knock and announce rule in felony drug investigations. Before leaving the *Richards* case, an analysis of the privacy interests served by the knock and announce rule is setforth in footnote five of the *Richards* opinion, Justice Stevens pointed out:

> when police enter a residence without announcing their presence, the residents are not given any opportunity to prepare themselves for such an entry . . . [t]he brief interlude between announcement and entry with a warrant may be the opportunity that an individual has to pull on clothes or get out of bed.

520 U.S. at 393. This same privacy concern is given meaning by the requirement that the searching officers are to pause a reasonable period of time before inferring a refusal of admittance.

Petitioner argues that the *Ramirez* case holds that the lawfulness of an entry does not depend on a special showing of "reasonable suspicion" where property is destroyed to effectuate a no knock entry and that it "follows that the prospect of property destruction does not require additional delay in the circumstances presented here." (Pet. Br. 12). This issue has not been squarely addressed by this Court. The *Ramirez* case addressed the issue of whether a heightened showing of exigent circumstances or reasonable suspicion is necessary to justify a "no knock" destructive entry. The *Banks* majority opinion did not address the issue of reasonable suspicion justifying a shortened pause between the announcement and the forcible entry. In *Banks*, *no* reasonable suspicion of exigent circumstances was found to be present. No particularized fact existed, which justified a hastened entry in *Banks*. Only generalized concerns for officer safety and destruction of evidence were the driving factors in the officers' decision to effectuate a forcible entry in 20 seconds or less. These generalized concerns were the same ones rejected by this Court in *Richards* as a basis to dispense with the knock and announce requirement in all drug cases. The petitioner strains to make the *Banks* case the *Ramirez* case. They involve two different issues of fact, (and law) under knock and announce principles.

B. The *Banks* Decision Presents a Fact Specific Resolution of What Constitutes a Reasonable Pause Before Making a Forcible Entry. The *Banks* Decision Does Not Create an Inflexible Rule in Derogation of the Reasonableness Inquiry.

Petitioner argues that the *Banks* majority opinion conflicts with the decisions of this Court, and other circuit courts by creating an inflexible rule supplanting the reasonableness standard (Pet. Br. 12). This is not so. The *Banks* majority opinion is based upon the unique matrix of facts presented in the case. The case does not establish any set times for law enforcement to pause, it simply found that under the totality of the circumstances presented in this case, that the 20 second or less pause between announcement and forcible entry was not reasonable. The "Guidelines" in the *Banks* case, even if rejected by this Court, should not alter the result.

In *Banks*, the officers were executing a search warrant in a drug investigation. The apartment in question was occupied by only one person. While the search of the two bedroom upstairs apartment occurred at two in the afternoon, the officers executed the warrant at a time when Mr. Banks was taking a shower. Las Vegas is known as a twenty four hour town, citizens could be sleeping or bathing at any hour of the day. No particularized suspicions of exigent circumstances were known to the officers, and no affirmative refusal of entry occurred. Mr. Banks testified that he heard no knock and announcement just the loud noise of the door being rammed open. None of the cases cited by the petitioner present these unique set of facts. Since the totality of the circumstances takes into account facts not found in other circuit court opinions, there is no actual "conflict" with other circuit courts' holdings.

The petitioner claims that the "Guidelines" setforth in *Banks* create a rigid framework which removes the flexibility of the reasonableness standard of the Fourth Amendment (Pet. Br. 12). The petitioner glosses over the factual analysis in *Banks*, which embodies the very essence of a case by case analysis by the majority. The "Guidelines" again, are *dicta*, and are not required to uphold the particularized analysis given to the facts by the majority. The totality of the circumstances test was a basis for holding the officers were acting unreasonably by pausing a mere 15 to 20 seconds before battering down the door.

The Solicitor General acknowledges that the *Banks* court characterized the "Guidelines" as "aids in the resolution of the case," not a substitution for a reasonableness inquiry (Pet. Br. 13). The Solicitor General claims the "Guidelines" constitute a judicial straight jacket for determining reasonableness. The cited example is that the police would be forced to wait additional periods of time at a barricaded door where security bars are installed on a home and where no exigent circumstances exist (Pet. Br. 14). There were no security bars on Mr. Banks' apartment.

The argument is creative, but has little or nothing to do with the case at bar. Again, even if this Court decides the "Guidelines" are unhelpful, misguided or just wrong, this should not affect the ultimate conclusion that under the facts in *Banks*, that the officers failed to pause long enough. Simply put, a person in the shower soapy and dripping wet, needs more than a mere 15 to 20 seconds to reasonably respond to a knock and announcement.

The Solicitor General's claims that *Banks'* case makes the officers engage in "senseless ceremony" where a building is, for example, empty (Pet. Br. 14). The argument is

unpersuasive. If the building is truly empty, a failure to knock and announce will not be litigated. To have standing to assert a knock and announce violation, the person must be present when the search is executed. *United States v. DeLutis*, 722 F.2d 902 (1st Cir. 1983) and *United States v. Lockett*, 919 F.2d 585 (9th Cir. 1990).

Second, if the officers truly believe the premises are unoccupied, their concerns for safety, escape and destruction of evidence vanish. Any pause by a constable erring on the side of caution hurts no one. What the Solicitor General really desires this Court to do is have it abdicate its traditional role as the overseer of police procedures, and defer "to the discretion of the executing officers to determine how best to proceed . . . " (Pet. Br. 15). Should this Court abandon its role as the supervisor of the administration of criminal justice and procedure, then important constitutional safeguards will all but disappear.

The Solicitor General also attacks the Ninth Circuit's "Guidelines" emphasis on property damage as it relates to the period officers must delay before entry (Pet. Br. 16). The breaking of a door presents the archetype evil the knock and announce rule is designed to prevent. In response the Ninth Circuit created "Guidelines" which require a more meaningful interval of time between the knock and announce and the forcible entry. As noted above at common-law, the knock and announce rule contemplated an overt refusal before destruction of property would be sanctioned.

The Solicitor General aptly points out that the *Ramirez* decision rejects heightened standards of exigent circumstances (Pet. Br. 17). But again, it must be recalled that the record in *Banks*, is that there were no exigent circumstances and no refusal. The whole argument of this section of the brief of the

Solicitor General addresses what is *dicta*. Take away the reference in *Banks* to the "Guidelines," and what is left is the constitutionally correct result.

Section II. B., of the petitioner's brief addresses law enforcement's quest to have reasonableness measured from "their eyes only." (Pet. Br. 18). The Solicitor General cites *United States v. Knapp*, 1 F.3d 1026, 1030 (10th Cir. 1993) for the proposition that the "critical issue is whether the officers were constructively refused admittance under §3109 by waiting ten to twelve seconds without receiving a response." Again, the Solicitor General wants this Court to give the police carte blanche on what is reasonable for purposes of the Fourth Amendment. The test is, and must remain, is what is reasonable under a totality of the circumstances. If Mr. Banks is the sole occupant of an apartment and is actually in the shower when the knock and announcement comes, it is not reasonable, under the Fourth Amendment, to expect he would answer the door stark naked and dripping suds, in 15 to 20 seconds or less. Homes are locations where private activities such as bathing frequently occur. Where an officer has no exigent circumstances, there is no refusal, and seeks to search a home where there is only one known occupant, the time allowed for a response should be greater under Fourth Amendment considerations.

In Section II C of the petitioner's brief, the Solicitor General asserts that the need to consider damage to property interferes with "the proper execution of warrants" (Pet. Br. 20). The argument is that the "Guidelines" cited in *Banks* constitute irrelevant factors in light of the *Ramirez* case. The Solicitor General points to factors it approves of which tend to increase the delay between announcement and entry, late night searches and times when "the occupant is in an unusual location inside the dwelling" or the dwelling is "unusually

large" (Pet. Br. 20). The facts in *Banks* are that he lives in a twenty four town, he is the sole occupant of a dwelling and at any given time, he may be involved in private activities, such as bathing, showering or sleeping. Of course, these are not factors the Solicitor General cites as requiring a need for additional delays.

There is a discussion of cases and circumstances (exigent circumstances) which "truncate" the delay period made by the Solicitor General (Pet. Br. 20). The Solicitor General concludes the "Guidelines" which focus on destruction of property "adds nothing to the balance" of determining the proper period of delay. In defense of the Ninth Circuit Court of Appeals' "Guidelines," it is clear that they were created to give a meaningful constraint on the power of the police to forcibly enter homes. The Ninth Circuit court focused on law enforcement's factual justification for a destruction of property. One of the chief purposes of the knock and announce rule is to prevent the unnecessary destruction of the habitation. This was one of the chief reasons that Parliament passed a knock and announce statute in the year 1275, and it still is a core consideration under Title 18 U.S.C. §3109, and the Fourth Amendment. This is the reasoning behind requiring a higher showing of need for the destruction of the door or window of a home.

In Section III of the petitioner's brief, it is asserted that the 15 to 20 second wait between the knock and announcement and the forcible entry was reasonable (Pet. Br. 22). As justification for this assertion the Solicitor General cites *United States v. Lucht*, 18 F.3d 541 (8th Cir. 1994). In *Lucht*, the police executed numerous search warrants in a large scale drug investigation. Several search warrants were executed without any knock and announcement due to the existence of exigent circumstances. (See *Lucht*,18 F.3d at 549). One

home that was searched was small (the Volkir and Rumsey residence). The two occupants were awake and "the possibility was slight that those within did not hear or could not have responded promptly." *Id*. at 549. There is no mention in *Lucht* of the occupants taking a shower. Further, where there is more than one occupant, it is unlikely they will be showering together, thus rendering it unreasonable to expect that an occupant could respond in 20 seconds or less. It is worth noting that the Ninth Circuit addressed a very similar fact pattern knock and announce case decided *after Banks*. This case is *United States v. Chavez-Miranda*, 306 F.3d 973 (9th Cir. 2002). In *Chavez-Miranda*, the DEA executed a search warrant after making controlled buys. The search warrant execution occurred at 6:15 p.m. on a small two bedroom apartment less than 800 square feet in area. The officer there conducted the knock and announcement in both English and Spanish. No response to the announcement was forthcoming. After 20 to 30 seconds the door was forced open. The Ninth Circuit noted the similarities between the *Banks* case, and its fact pattern in *Chavez-Miranda* 306 F.3d 973 at 980-81. In *Chavez-Miranda* the court noted:

> We note that there are a number of similarities between *Banks* and this case. In both cases the apartments were small and the narcotics warrants were being executed at a time when one would reasonably expect the residents to be awake. In addition, in both cases the police did not hear any noise from inside the apartments suggesting that they had been heard but were being refused admittance, and no exigent circumstances present.

Despite these similarities in the *Chavez-Miranda* case the district court's denial of the suppression motion was affirmed. The Ninth Circuit distinguished *Chavez-Miranda* from *Banks*

because there were at least three known occupants in the small apartment. The police also had specific knowledge of the apartment layout and size. In *Banks*, the police did not know if anyone was home. Lastly, the court in *Chavez-Miranda* reasoned that "even if one of the three individuals inside the apartment was in the bathroom or otherwise indisposed, one of the others should have been available to respond." (306 F.3d at 981). This same distinction from the *Banks* case exists in both *Lucht* and *Chavez-Miranda*. *Chavez-Miranda* reveals that *Banks* has not created a "rigid rule" or fixed time on how much pause is a reasonable period under the totality of the circumstances.

The next case cited by the petitioner is *United States v. Spriggs*, 996 F.2d 320 (D.C. Cir. 1993) (Pet. Br. 13). In *Spriggs*, the DEA executed a search warrant at 7:45 a.m. on a weekday. The agents waited approximately 15 seconds between the knock and announcement before forcing the door open. The Court of Appeals for the District of Columbia noted that when the door was forced open, Spriggs and his wife were found coming out of the bedroom door some 25 to 35 feet away from the point of entry. *Spriggs*, 996 F.2d at 322. There is no mention of Mr. Spriggs being "indisposed" although he initially challenged the search on the basis of a single knock and announcement being unlikely to be heard in the morning. Again, there were two occupants in *Spriggs*, unlike *Banks*. In *Banks* there was uncontroverted evidence that he was in the shower when the knock and announcement occurred. The prosecution in *Banks*, argued, at the district court level, that the shower prevented him from hearing the knock and announcement. The District of Columbia Circuit could have well decided the *Banks* case in the same fashion as the Ninth Circuit given its recognition: "The time that section 3109 requires officers to wait before they may construe no response as a denial of admittance depends largely on the

factual determinations made by the trial court." *Spriggs*, 996 F.2d at 322. The *Spriggs* court noted that in *Griffin v. United States*, 618 A.2d 114 (D.C. App. 1992), a 30 second delay was found insufficient under the knock and announcement requirement, because the search was conducted at 1:30 a.m., and it was unreasonable to think the occupants were awake and able to respond promptly.

The next case cited by petitioner is the Fifth Circuit Case, *United States v. Jones*, 133 F.3d 358 (5th Cir. 1998) (Pet. Br. 14). In *Jones*, the police executed a search warrant after pausing 15 to 20 seconds after the knock and announcement. The facts recounted in the *Jones* case are scant to say the least. Mr. Jones argued that 15 to 20 seconds is not a reasonable period to expect an occupant to respond to "a potentially unexpected announcement." While it is somewhat speculative, one would suspect that had Mr. Jones been the sole occupant and been indisposed for some reason, these facts should have merited mention. In *Jones*, the Fifth Circuit found a 15 to 20 second wait (under a common-law knock and announcement rule) sufficient time given the danger in drug cases of destruction of evidence. *Jones*, 133 F.3d at 361-362. The record is barren of any particularized facts justifying this fear. The *Jones* court did note: "It is possible that a delay in a particular case might be too short to imply refusal of admittance under section 3109, but would be reasonable for the Fourth Amendment . . ." *Jones* 133 F.3d at 361. The Fifth Circuit in *Jones* recognized that a time frame greater than 15 to 20 seconds might be necessary under Title 18 U.S.C. §3109, which is the provision applicable to analysis under the *Banks* case.

The next case cited by petitioner is *United States v. Garcia*, 983 F.2d 1160 (1st Cir. 1993) (Pet. Br. 14). In *Garcia*, police officers obtained a state search warrant after

having made a controlled buy. The officers went to the apartment and knocked and announced their presence. They waited ten seconds and after hearing no response made a forcible entry. When the officers burst through the door they saw the defendants and a woman holding a child in the front room watching television. *Garcia*, 983 F.2d at 1168. The court in *Garcia* focused primarily on the easily hidden or destroyable nature of the evidence as justifying the short pause. The facts in *Garcia* indicate that the officers were aware of the immediate presence of the occupants given that they were watching television just behind the closed door, and the failure to respond quickly gave rise to an inference of refusal. Although this was not specifically addressed in the court's analysis, it does however, provide some factual justification for the short delay between announcement and entry. The facts specific to the *Banks* case were not the facts before the *Garcia* court.

The petitioner cites the case of *United States v. Gatewood*, 60 F.3d 248 (6th Cir. 1995) to argue that the *Banks* decision conflicts with other circuit courts (Pet. Br. 14). In *Gatewood*, the police officers executed a search warrant by knocking and announcing. A video tape of the incident revealed that the occupants unlocked the door and opened it after ten seconds. There was no forcible entry in the case. The *Gatewood* case is a knock and admittance case. The *Gatewood* court, despite the clear evidence of admittance, alternatively concluded had a forcible entry occurred, the delay was reasonable. 60 F.3d at 250-51. In contrasting *Gatewood* with *Banks*, had respondent actually answered the door, undoubtedly, there would have been a different result in the Ninth Circuit.

The petitioner refers to the case of *United States v. Markling*, 7 F.3d 1309 (7th Cir. 1993), as a case which is at odds with the *Banks* majority opinion (Pet. Br. 14). In

Markling, the police executed a search warrant on a motel room as part of a drug investigation. The police, prior to executing the search warrant, observed Mr. Markling return to his motel room about 5 p.m. Thereafter, two suspected drug buyers went to the motel room and after six minutes they departed. The two were stopped, searched and two bags of cocaine base were recovered from their persons. One of the drug buyers advised that Mr. Markling was "extremely paranoid" and would "flush any other drugs in the room down the toilet if he became suspicious." *Markling*, 7 F.3d at 1312. At about 7 p.m. the police executed the search warrant through a knock and announcement at an adjoining room door, they waited seven seconds, and after hearing no response they made a forcible entry. They discovered Mr. Markling in a fetal position on the bathroom floor. *Id*. The obvious difference in facts between the *Banks* case and *Markling* is the particularized knowledge from the officers investigation that Mr. Markling was highly likely to destroy evidence. This case presents exigent circumstances which were not present in the *Banks* case. Obviously, most, if not all, motel rooms are significantly smaller than two bedroom apartments. The officers heard no noise which might make the announcement difficult to hear. Under these different facts the Seventh Circuit found that it was reasonable for the officers to conclude after a seven second lapse Mr. Markling "was not going to answer the door." *Markling*, 7 F.3d at 1318.

Petitioner next cites *United States v. Goodson*, 165 F.3d 610 (8th Cir. 1999) as another example of how *Banks* is at odds with other circuit courts (Pet. Br. 14). The *Goodson* case involved the search of a one story ranch home. The police officers, executing a search warrant for drugs at 1:44 a.m., knocked twice and announced their presence (and presumably their purpose). *Goodson* 165 F.3d at 614. In

Goodson, the officers were concerned for officer safety because the suspect had a violent criminal history for assault with a deadly weapon. The officer, after waiting 20 seconds for a response, forced entry because he feared for officer safety and was concerned about destruction of evidence. This case involves exigent circumstances. Here, the forcible entry after a 20 second delay was upheld because there was a particularized concern for officer safety. In *Banks*, the officers had no known violent criminal history of the suspect which would give rise to reasonable suspicion that a greater risk to officer safety existed. These important facts are different between the two cases and can account for the differing results under the totality of the circumstance's test.

Another case cited by the petitioner as indicative of the majority opinion in *Banks* as being out of conformity with other circuit courts is *United States v. Jenkins*, 175 F.3d 1208 (10th Cir. 1999). (Pet Br. 25). In *Jenkins*, the police obtained a search warrant as part of a narcotics investigation. The search warrant was authorized to search the residence of the co-defendant Monika Payne, the girlfriend of Mr. Jenkins. Mr. Jenkins had a child with Ms. Payne and she regularly resided at the house. *Id*. *Jenkins* involved a search executed at 10 a.m. In *Jenkins*, the police were aware that there were multiple occupants in the home. The surveillance established that although the residence was Ms. Payne's, Mr. Jenkins was regularly present. *Jenkins*, 175 F.3d at 1216. The total time between the initial knock and announce and the application of force on the inner door, was 14 to 20 seconds. *Jenkins*, 175 F.3d at 1211. When the officers entered the home they found Mr. Jenkins' girlfriend, Ms. Payne, near the front door. Mr. Jenkins and his daughter were in a bedroom where they were laying on the bed. *Jenkins*, 175 F.3d at 1211. Mr. Jenkins contended the police department had a ten second wait policy before force would be applied after an announcement.

Jenkins, 175 F.3d at 1212. The Tenth Circuit noted that the record below did establish that the Wichita police department trains its officers to wait ten seconds after knocking and announcing before forcibly entering a residence "which apparently does not vary according to the size of the premises to be searched." 175 F.3d at 1214. The Tenth Circuit noted "such an inflexible policy clearly would violate the knock-and-announce standard." c.f. *United States v. Ward*, 171 F.3d 188 (4th Cir. 1999) (stating that a purported sixty second FBI policy would be troublesome under section 3109 in light of rule that amount of time officers must wait varies with exigencies of each case). The *Jenkins* court expressed "grave concerns" over the rigid rule of the Wichita Police Department's "10 second" policy. *Jenkins*, 175 F.3d at 1214-15. The *Jenkins* court noted that "compliance with the knock-and-announce component of the Fourth Amendment reasonableness inquiry must be evaluated on a fact dependent, case by case basis." 175 F.3d at 1214. The *Jenkins* court noted in reviewing the relevant case law that "the prospect of utilizing these cases as guideposts is appealing, a bright line rule for determining how much time is enough is inappropriate." 175 F.3d at 1213. The *Jenkins* court sustained the forcible entry into the home after a wait of 14 to 20 seconds. It noted that the police knocked and announced twice. Further, the *Jenkins* court noted that the warrant was executed in the middle of the day when "'most people are awake and engaged in everyday activities.'" 175 F.3d at 1215 c.f., *United States v. Spikes*, 158 F.3d 913, at 927 (6th Cir. 1998). The distinguishing facts between *Banks* and *Jenkins*, are that the officers in *Jenkins* believed that there were multiple occupants at the residence where, as in *Banks*, the officers were aware of only one occupant, and did not know whether he was even home when the warrant was executed. Further, in the *Jenkins*' case, because of multiple occupants, it was unlikely that if one person was "indisposed" that the

other occupants would be unable to respond in the 14 to 20 second time frame. The Ninth Circuit's approach in *Banks* was the application of the totality of the circumstances test. *Banks*, in the majority opinion, concluded that under the unique facts of that case, it was unreasonable to infer a refusal in 15 to 20 seconds, where the sole occupant was indisposed taking a shower. Apparently, petitioner wants this Court to announce a rigid rule that 15 to 20 seconds constitutes sufficient time to infer a refusal under the knock and announcement statute. This would virtually eliminate the Court's supervisory role in a crucial area of the Fourth Amendment. The adoption of a rigid rule of "20 seconds" would short circuit Fourth Amendment reasonableness inquiries.

C. The Suppression of Evidence in *Banks*, Vindicates Fundamental Fourth Amendment Protection Against Invasions of Privacy.

The petitioner asserts that "even if the officers had waited longer, respondent still would not have heard them" and answered the door. (Pet. Br. 26). The argument is essentially that the forcible entry would have inevitably been made anyway (albeit at a later point in time) so that there was "no harm and no foul." The petitioner then contends the sanction of suppression is in effect a disproportional punishment on society's interest in effective law enforcement. (Pet. Br. 15-17). The petitioner never raised this issue below. The general practice of this Court is not to consider matters not raised below, unless they be deemed plain error.

Petitioner cites *United States v. Espinosa*, 256 F.3d 718 at 725 (7th Cir. 2001) for the proposition that "the application of the exclusionary rule should be limited only to those instances where the constitutional violation has caused actual

harm . . ." Yet, Respondent's Fourth Amendment privacy interests *were* harmed. He was confronted with armed strangers bursting into his home while he stumbled naked, wet and in fear for his life.

In *Miller v. United States*, 357 U.S. 301, 78 S.Ct. 1190, 2 L.Ed. 2d 1332 (1958), police officers went to Mr. Miller's home to arrest him for narcotics violations. The officers knocked and said "Police," but did not indicate they had an arrest warrant. Mr. Miller then tried to shut the door and they forced entry. Inside, narcotics were seized incident to arrest. The one issue on appeal was the officer's failure to announce his purpose before entry pursuant to Title 18 U.S.C. §3109. In determining the failure to announce the officer's purpose prior to forcible entry was a violation of §3109, Justice Brennan, speaking for this Court stated:

> We are duly mindful of the reliance that society must place for achieving law and order upon the enforcing agencies of the criminal law. But insistence on observance by law officers of traditional fair procedural requirements is, from the long point of view, best calculated to contribute to that end. However, much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of shortcut methods in law enforcement impairs its enduring effectiveness. The requirement of prior notice of authority and purpose before forcing entry into a home is deeply rooted in our heritage and should not be given grudging application. Congress, codifying a tradition embedded in Anglo-American law, has declared in §3109 the reverence of the law for the individual's right of privacy in his house. Every householder, the good and the bad, the guilty and the innocent, is entitled to the protection designed to secure the common interest against unlawful invasion of the house.

Miller, 357 U.S. at 313. Although it will never be known for sure, had the officers in *Banks* paused just a bit longer, it might have afforded respondent the chance to have met the intruders with the small dignity of a towel. It is just this sort of privacy interest which is at the very core of the Fourth Amendment. Respondent denies petitioner's assertion that there was no causal relationship between the violation of the Fourth Amendment and his privacy interests. (Pet. Br. 25).

Lastly, the Solicitor General argues that the inevitable discovery rule or independent source doctrine should apply to the fruits of the search in *Banks*. The reasoning is that a search warrant was properly issued therefore the search was inevitable (Pet. Br. 27-29). This logic would remove most, if not all, knock and announce violations from judicial scrutiny. It would reward the violators of the knock and announce rule's long standing constraints on forcible invasions of the home. The Sixth Circuit, in *United States v. Dice*, 200 F.3d 978, 985 (6th Cir. 2000) made an outright rejection of the inevitable discovery doctrine exception where knock and announce violations occurred. In *Dice*, that court noted that there was no evidence that a second, independent investigation would have led to the evidence. In *Dice*, as in *Banks* the officers executing a search warrant in a drug investigation announced their purpose, but waited "a few" seconds before forcing entry. No exigent circumstances were present. In *Dice*, the Defendant, who was in the kitchen, heard no announcement, but rather his dogs barking loudly as officers crashed through his door.

In *Dice*, 200 F.3d 978 at 983, the Sixth Circuit found that the knock and announce rule requires "officers wait a 'reasonable' period of time after a knock before physically forcing their way into a residence." [c.f. *United States v. Finch*, 998 F.2d 349 at 354 (6th Cir. 1993)]. The *Dice* court correctly noted that the subsequent search and seizure was a direct result of the "exploitation of [the initial] illegality." (c.f. *Segura v. United States*, 468 U.S. 796, 804, 82 L.Ed2d 599, 104 S.Ct. 3380 (1984). The *Dice* court also reasoned that the exclusionary rule's exception the "independent and lawful source" doctrine should only apply where the possession of evidence is gained from a source wholly independent of the constitutional violation. *Id.* 200 F.3d at 984. This ruling makes fundamental sense that the government "not profit" from its illegal activity. *Id.*

The independent source doctrine/inevitable discovery doctrine has no application here. There is no independent investigatory source which would have inevitably led to the evidence seized in *Banks*. The entry was tainted by illegality, and the closely connected fruits of the search were properly suppressed.

CONCLUSION

Based upon the foregoing, the judgment of the court of appeals should be affirmed.

DATED this July 11, 2003.

Respectfully submitted,

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No. 02-473

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

LASHAWN LOWELL BANKS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

No. 02-473

UNITED STATES OF AMERICA, PETITIONER

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LASHAWN LOWELL BANKS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

As petitioner demonstrated in its opening brief, the Ninth Circuit has adopted an unprecedented, complex, four-part matrix for determining how long officers must wait, after knocking and announcing their presence and receiving no response, before they may enter a residence to execute a valid search warrant. Under the Ninth Circuit's approach, the primary factor is whether the officers must damage some property to effectuate the entry. That approach is inconsistent with this Court's recognition that the Fourth Amendment does not "mandate a rigid rule of announcement," *Wilson* v. *Arkansas*, 514 U.S. 927, 934 (1995), and with this Court's holding that the reasonableness of a no-knock forced entry "depends in no way on whether police must destroy property in order to enter," *United States* v. *Ramirez*, 523 U.S. 65, 71 (1998). Respondent's attempts to defend the Ninth Circuit's ruling in this case

—a ruling the Ninth Circuit has since candidly acknowledged is inconsistent with its own prior decisions and the decisions of many other courts of appeals, see *United States* v. *Chavez-Miranda*, 306 F.3d 973, 981-982 n.7 (9th Cir. 2002), cert. denied, 123 S. Ct. 1317 (2003)—are unavailing.

I. THE COURT OF APPEALS' DECISION IS INCONSISTENT WITH THIS COURT'S PRECEDENTS

1. As explained in petitioner's opening brief (U.S. Br. 10-22), the Ninth Circuit's rigid and confusing categorical scheme disregards the myriad factual circumstances and dangers confronting officers executing warrants, and in a variety of circumstances would reduce the knock-and-announce requirement to a "senseless ceremony." *Wilson*, 514 U.S. at 936. It also improperly elevates certain factors, such as the destruction of property, which have little or no bearing on the reasonableness of the officers' entry, while ignoring or minimizing other, highly relevant factors, such as the real risk that a suspect would try to destroy evidence (by, for example, flushing the drugs down the toilet). See U.S. Br. 12-16. The Ninth Circuit's approach is therefore antithetical to the flexibility inherent in the Fourth Amendment's general reasonableness standard. See *Wilson*, 514 U.S. at 934; *Ramirez*, 523 U.S. at 71; see also *Ker* v. *California*, 374 U.S. 23, 33 (1963) (holding that "[e]ach case is to be decided on its own facts and circumstances" and that the "standards of reasonableness under the Fourth Amendment are not susceptible of Procrustean application").

Respondent attempts to characterize the Ninth Circuit's categorical scheme as a simple application of the "totality of the circumstances" standard that has long been applicable to challenges to the execution of a

search warrant. Resp. Br. 12, 23. According to respondent, the court of appeals' four-part matrix "was merely an analytical distillation of cases" interpreting 18 U.S.C. 3109 and does not require a different period of delay for each category it defines. Resp. Br. 10-11.

Respondent's reading of the opinion below is mistaken. The Ninth Circuit plainly envisioned each of its categories as requiring a different period of delay, with the two determinative factors being whether property must be damaged to effectuate the entry and whether there are exigent circumstances. By its terms, for example, the Ninth Circuit's categorical scheme would require that, absent exigent circumstances, officers must allow for "a lapse of a significant amount of time" before making a *non-forcible* entry. Where, however, that same entry would require *force* that may result in some property damage, the officers must allow "an even more substantial amount of time" after knocking and announcing. Pet. App. 5a-6a. Indeed, at one point, respondent himself appears to acknowledge that the Ninth Circuit's categorical scheme requires additional delays merely because property may be destroyed in a forcible entry. Resp. Br. 25 ("[T]he Ninth Circuit created 'Guidelines' *which require a more meaningful interval of time* between the knock and announce and the forcible entry.") (emphasis added).

Respondent's attempt to characterize the Ninth Circuit's so-called "Guidelines" as dicta is also mistaken. See Resp. Br. 13 ("The Guidelines in *Banks* do not affect the outcome of the case, and the over-arching question which is: whether the officer had paused sufficiently under a reasonableness standard of the Fourth Amendment before making a forcible entry."). The Ninth Circuit expressly applied its "Guidelines" in this case, holding that the entry into respondent's apart-

ment fell into the fourth category of its matrix (forcible entry in the absence of exigent circumstances) and therefore required "an even more substantial amount of time" after knocking and announcing before the officers could lawfully enter the apartment. Pet. App. 6a. Accordingly, the Ninth Circuit adopted an erroneous legal standard and then applied it to the facts of this case. Its holding that the officers violated the Fourth Amendment because they did not wait the "even more substantial amount of time" required under the court's inappropriate standard cannot be dismissed as mere dicta.

2. In addition, as explained in petitioner's opening brief (U.S. Br. 16-22), the Ninth Circuit's reliance on property destruction is fundamentally at odds with this Court's holding in *Ramirez* that the reasonableness of a no-knock entry "depends in no way on whether police must destroy property in order to enter." 523 U.S. at 71. It is no answer to argue, as respondent does (Resp. Br. 12), that *Ramirez* involved a no-knock entry and therefore has no bearing on whether property damage is relevant to determining the reasonableness of an entry where the officers have knocked and announced their presence. *Ramirez* reflects a general principle that the need to damage property to effectuate an entry to execute a search warrant is not part of the analysis of whether the entry itself was reasonable and whether evidence should be suppressed. Instead, the proper inquiries are whether admittance has been effectively refused and whether other law enforcement needs render prompt entry reasonable. See U.S. Br. 18-19.

The Ninth Circuit's decision below nevertheless engrafts a rigid property-destruction limitation onto the knock-and-announce requirement of the Fourth Amendment and 18 U.S.C. 3109, and it does so without

distinguishing, or even citing, *Ramirez*. Indeed, the Ninth Circuit went so far as to hold in category two of its matrix that, even where exigent circumstances exist, the need to damage property to effectuate an entry "necessitat[es] *more specific inferences of exigency*," Pet. App. 5a-6a (emphasis added)—the very requirement this Court rejected in *Ramirez*. See 523 U.S. at 69-70 (quoting *United States* v. *Ramirez*, 91 F.3d 1297, 1301 (9th Cir. 1996)).

Unable to re-characterize the Ninth Circuit's disregard for this Court's holding in *Ramirez*, respondent embraces it, conceding that "[t]he 'four categories' pointed out by the *Banks* court is an effort by the Ninth Circuit to classify the various kinds of entries by police *and require a higher standard of exigencies where destruction of property occurs*, and there is a claim of a knock and announce violation." Resp. Br. 13 (emphasis added). Respondent nevertheless attempts to excuse the panel majority's flouting of *Ramirez* as "the Ninth Circuit Court's effort to give a higher meaning to the Fourth Amendment, and the knock and announce rule which it incorporates." *Ibid.* That description of the court of appeals' goal, however apt, cannot justify its disregard for this Court's precedents.

As petitioner explained in its opening brief (U.S. Br. 20-21), by the time officers have determined that a forcible entry is necessary, they have already balanced the factors that make it reasonable to delay a given period of time before entering, and the need to damage property to effectuate the entry adds nothing to that balancing process. The Ninth Circuit's rigid requirement that officers must wait "an even more substantial amount of time" whenever property may be damaged during the entry would have the perverse effect of encouraging criminals to barricade their doors or take

other actions to increase the amount of property that must be destroyed to effectuate an entry, thereby maximizing the time available to them to escape, dispose of evidence, or otherwise resist the lawful search. Such a result is plainly at odds with *Ramirez* and this Court's other decisions mandating flexibility and common sense in the application of the Fourth Amendment's knock-and-announce requirement.[1]

II. THE ACTIONS OF THE OFFICERS IN THIS CASE WERE PLAINLY REASONABLE

Under the correct legal standard, the officers' actions in forcibly entering respondent's apartment after knocking and announcing their presence and waiting 15-20 seconds without hearing a response was reasonable. Respondent himself concedes that the officers went to his small apartment at 2 p.m. on a weekday to execute a valid search warrant for drugs, evidence which is readily disposable; that the officers "knocked loudly and announced 'Police, search warrant' in a loud authoritative tone"; that the officers did not receive any response; and that they waited at least 15-20 seconds after knocking and announcing before forcibly entering the apartment. Resp. Br. 3-5; Br. in Opp. 3. Respon-

[1] Respondent makes no attempt to confront the dangerous consequences that could flow from the Ninth Circuit's property-destruction standard. Instead, he appears to favor a standard that would have even more dangerous consequences. According to respondent (Resp. Br. 20), "[a]t common-law, law enforcement officers were required to pause until a refusal occurred." Under this so-called "common-law knock and announce rule," *ibid.*, officers are required to continue knocking and announcing until they received an express refusal of admittance. Such a standard is patently inconsistent with this Court's repeated rejection of a "rigid rule of announcement," *e.g.*, *Wilson*, 514 U.S. at 934, and its effect on legitimate law enforcement efforts could be catastrophic.

dent also acknowledges that he was in the shower at the time and did not hear the officers' knock and announcement. Resp. Br. 4; see Pet. App. 14a-16a. Under such circumstances, the officers acted reasonably and the evidence that they obtained during the search of the premises should not have been suppressed.

As petitioner demonstrated in its opening brief (U.S. Br. 22- 25), entries such as the one in this case have been routinely upheld by other courts of appeals. Respondent's attempts to distinguish these conflicting cases are unpersuasive. Frequently, for example, respondent relies on facts, such as the number of occupants and whether any occupant was in the shower or was otherwise "indisposed," that were unknown to the officers at the time they forcibly entered the residence. See Resp. Br. 27-34. That error, in fact, is repeated throughout respondent's brief. See, *e.g.*, *id.* at 26 ("If Mr. Banks is the sole occupant of an apartment and is actually in the shower when the knock and announcement comes, it is not reasonable, under the Fourth Amendment, to expect he would answer the door stark naked and dripping suds, in 15 to 20 seconds or less."). To the extent that respondent's point is that the mere possibility that an occupant might be in the shower or otherwise indisposed means that officers must routinely wait the period of time necessary for the occupant to, for example, stop the shower, dry off, put on a robe, and answer the door, that argument ignores the fact that such an interval would also allow for the complete destruction of evidence or successful escape. Officers executing a warrant routinely are required to make quick judgments based on reasonable probabilities and without knowing what is going on inside a residence. That is one reason why, as this Court explained in *Dalia* v. *United States*, 441 U.S. 238, 257 (1979), "it is

generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant."

In any event, there is no doubt that the Ninth Circuit's decision in this case is inconsistent with the decisions of many other courts of appeals. The court below itself has acknowledged that its reasoning in this case is inconsistent with its own precedents and those of several other courts of appeals. *Chavez-Miranda*, 306 F.3d at 981-982 n.7 ("*Banks* appears to be a departure from our prior decisions. As noted by the trial court, we have found a 10 to 20 second wait to be reasonable in similar circumstances, albeit when the police heard sounds after the knock and announcement. * * * Several other circuits have upheld similar waits even without noise being heard."). Specifically, in *Chavez-Miranda*, *ibid.*, the Ninth Circuit noted that its decision in this case conflicted, *inter alia*, with the First Circuit's decision in *United States* v. *Garcia*, 983 F.2d 1160, 1168 (1993), the Fifth Circuit's decision in *United States* v. *Jones*, 133 F.3d 358, 361-362, cert. denied, 523 U.S. 1144 (1998), the Eighth Circuit's decision in *United States* v. *Lucht*, 18 F.3d 541, 548, 549, cert. denied, 513 U.S. 949 (1994), and the D.C. Circuit's decision in *United States* v. *Spriggs*, 996 F.2d 320, 323, cert. denied, 510 U.S. 938 (1993), all of which were discussed in petitioner's opening brief (U.S. Br. 22-25), and all of which respondent unsuccessfully attempts to distinguish on their facts (see Resp. Br. 27-30). In addition, the Sixth Circuit, in upholding the reasonableness of a forced entry 8-10 seconds after the officers knocked and announced their presence, recently rejected the Ninth Circuit's reasoning in this case as "inconsistent with [Sixth Circuit] precedent[s]." *United States* v. *Pennington*, 328 F.3d 215, 222 n.4 (2003).

Respondent also mistakenly asserts (Resp. Br. 35) that petitioner is seeking to frustrate the totality-of-the-circumstances test by advocating "a rigid rule that 15 to 20 seconds constitutes sufficient time to infer a refusal under the knock-and-announcement statute." To the contrary, petitioner asks this Court to reject the Ninth Circuit's rigid categorical scheme precisely because it lacks the flexibility vital to the proper application of the totality-of-the-circumstances test, fails to take into account the full range of factual circumstances facing law enforcement officers, and places undue reliance on the destruction of property, which has little or no bearing on the reasonableness of the officers' entry. In any event, respondent cannot use the flexibility of the totality-of-the-circumstances analysis to justify the Ninth Circuit's plainly erroneous holding that a delay of 15-20 seconds after knocking and announcing was unreasonable under the circumstances of this case. See U.S. Br. 22-25.

III. SUPPRESSION OF EVIDENCE WOULD BE AN IMPROPER REMEDY

Even if there were a knock-and-announce violation in this case, suppression of evidence would be an unjustified remedy. That is so for two reasons. First, the entry in this case caused no harm to any of the interests protected by the Fourth Amendment. Because respondent was in the shower and did not hear the officers when they knocked and announced, events would have unfolded no differently had the officers delayed longer before entering. The search warrant authorized entry, and respondent would have been in the same position had the officers waited a few more moments before executing the warrant. See Pet. App. 16a (Fisher, J., dissenting). Accordingly, respondent misses the point

when he contends (Resp. Br. 36) that his Fourth Amendment privacy interests were harmed because "[h]e was confronted with armed strangers bursting into his home while he stumbled naked, wet and in fear for his life." He would have been confronted with the exact same scenario even if the officers had delayed longer before forcibly entering his apartment.

Second, suppression would be an improper remedy because the entry was not causally connected to the discovery of the evidence in this case. As reflected in the inevitable-discovery and independent-source exceptions to the exclusionary rule, suppression is generally appropriate only where the constitutional violation is causally connected to the discovery of the challenged evidence. See U.S. Br. 27-28. Here, the evidence was discovered as a result of the warrant-authorized search. Application of the exclusionary rule in such circumstances places the government in a worse position than it would have been in had there been no violation and, therefore, imposes unjustified costs on society. See, *e.g.*, *Nix* v. *Williams*, 467 U.S. 431, 443 (1984) ("[T]he interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse*, position that they would have been in if no police error or misconduct had occurred."); *Segura* v. *United States*, 468 U.S. 796, 815 (1984) ("Suppression is not justified unless 'the challenged evidence is in some sense the product of illegal governmental activity.'") (citation omitted); see also *United States* v. *Langford*, 314 F.3d 892, 894 (7th Cir. 2002) ("[I]t is hard to understand how the discovery of evidence inside a house could be anything but 'inevitable' once the police arrive with a warrant.") (citation omitted); *United States* v. *Jones*, 214 F.3d 836,

838 (7th Cir. 2000) ("A warrant authorized the entry, so seizure of evidence was inevitable."); but see *United States* v. *Marts*, 986 F.2d 1216, 1219-1220 (8th Cir. 1993) (rejecting in dicta application of independent-source doctrine to violation of knock-and-announce rule); *United States* v. *Dice*, 200 F.3d 978, 985 (6th Cir. 2000) (rejecting inevitable-discovery exception in knock-and-announce violation case where there was no evidence that a second, independent investigation would have led to discovery of evidence).[2]

Finally, respondent is mistaken in suggesting that the requirement that there be a causal connection between an alleged knock-and-announce violation and the discovery of evidence before the evidence may be suppressed "would remove most, if not all, knock and announce violations from judicial scrutiny." Resp. Br. 37. Law enforcement officers would still have ample incentives to comply with the Fourth Amendment's

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[2] Respondent mistakenly asserts (Resp. Br. 35) that petitioner never raised the remedy issue below. In the suppression hearing before the magistrate judge, petitioner argued that the motion to suppress should be denied because respondent "was in the shower. If they would have waited, you know, another thirty seconds or maybe another ninety seconds or a hundred and twenty seconds, he would have never heard it 'cause he was in the shower. The only thing he hears is the battering ram through the door. So, that point is moot." J.A. 147. In addition, petitioner argued in its petition for rehearing in the court of appeals that "application of the exclusionary rule [was] inappropriate" because "a longer delay would have made no difference to the events that subsequently transpired." Gov't C.A. Pet. for Reh'g 15. In any event, respondent failed to raise any preservation issues in his brief in opposition to certiorari, and under Rule 15.2 of this Court's Rules, he may, therefore be deemed to have waived any such objection. See *City of Oklahoma City* v. *Tuttle*, 471 U.S. 808, 815-816 (1985); *City of Canton* v. *Harris*, 489 U.S. 378, 385 (1989).

knock-and-announce requirement. To begin with, officers' concern for their own safety is itself significant incentive to follow the knock-and-announce rule. See *United States* v. *Mendoza*, 281 F.3d 712, 717 (8th Cir.) ("Because [the police] announced their presence and stated their purpose, the potential for violence was diminished."), cert. denied, 123 S. Ct. 515 (2002); *United States* v. *Bustamante-Gamez*, 488 F.2d 4, 11 (9th Cir. 1973) ("[I]f announcement is made simultaneously with or shortly before entry it is unlikely that a law-abiding citizen would respond violently or provoke violence on the part of the officers."), cert. denied, 416 U.S. 970 (1974); cf. *Sabbath* v. *United States*, 391 U.S. 585, 589 (1968); *Miller* v. *United States*, 357 U.S. 301, 313 n.12 (1958). In addition, judicial remedies for constitutional violations may be available through claims under 42 U.S.C. 1983 and the *Bivens* doctrine. See *Langford*, 314 F.3d at 894-895. There are also non-judicial remedies that will continue to deter law enforcement officers from violating the knock-and-announce rule, such as the possibility of departmental discipline. See *Nix*, 467 U.S. at 446 ("Significant disincentives to obtaining evidence illegally—including the possibility of departmental discipline and civil liability —also lessen the likelihood that the ultimate or inevitable discovery exception will promote police misconduct.") (citing *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 397 (1971)). Moreover, given the nature of Fourth Amendment inquires, and in particular the application of the totality-of-the-circumstances standard, it is never in the interests of law enforcement for officers to be adjudicated to have violated the Fourth Amendment before they have even crossed the threshold of a residence to execute a search warrant. Lastly, officers would still have incentives to avoid

potential Fourth Amendment challenges by knocking and announcing their presence and asking for consent to search the premises, and suppression would remain a potentially appropriate remedy where the officers fail to comply with the knock-and-announce requirement and the warrant authorizing the search is defective.

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For the foregoing reasons and those set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

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